

U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 09 January 2007

Case No.: 2004-LHC-2057

OWCP No.: 07-16563

In the Matter of:

C.S.

Claimant,

v.

**INGRAM BARGE COMPANY,
as successor to ORSOUTH TRANSPORT
COMPANY and CAPITOL MARINE SUPPLY,
Employer,**

and

**SIGNAL INDEMNITY ASSOC., LTD.,
Carrier**

APPEARANCES:

**GREGORY S. UNGER, ESQ.,
On Behalf of the Claimant**

**JEREMIAH A. SPRAGUE, ESQ.,
On Behalf of the Claimant**

**ANDRE MOULEDOUX, ESQ.,
On Behalf of the Employer**

**DANIEL J. HOERNER, ESQ.,
On Behalf of the Employer**

**MAURICE E. BOSTICK, ESQ.,
On Behalf of the Carrier**

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),¹ brought by Claimant against Ingram Barge Company as Successor to Orsouth Transport Company and Capitol Marine Supply (Employer) and Signal Mutual Indemnity Association, Ltd. (Carrier).²

The matter was referred to the Office of Administrative Law Judges for a formal hearing. All parties were represented by counsel.³ On 17 Mar 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:⁴

Witness Testimony of

Claimant's mother
Claimant's father
Matthew Huntley, Jr.
Thomas Cornwell

Exhibits

Claimant's Exhibits (CX) 1-40
Employer's Exhibits (EX) 1-44

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS⁵

1. If in fact there were accidents that led to a compensable injury, then:
 - a. There is jurisdiction under the Act.
 - b. An employee/employer relationship existed at the time of the injuries.

¹ 33 U.S.C. §901 *et seq.*

² Signal only covered Employer for the disputed 16 Sep 02 accident. Employer was self-insured for the prior accidents.

³ Claimant was not present at the hearing. He was aware of his right to be at the hearing and to confront witnesses. However, since he was not testifying and apparently had some concerns about becoming angry at the hearing, he waived his right to be present. His absence was not construed in any way to substantiate his claim of anger and rage management problems. Claimant's recorded statement after his 16 Sep 02 accident is part of the record.

⁴ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁵ The parties did not submit a joint stipulation, but several stipulations were made on the record at the hearing.

- c. The injuries occurred within the course and scope of employment.
- 2. Accidents occurred on 06 Feb 01 and 02 Mar 01.
- 3. Employer stipulates to the occurrence of an accident on 16 Sep 02.
- 4. Employer was properly notified of Claimant's injuries at the time of the accidents.
- 5. There was proper and timely controversion.
- 6. Some medical benefits have been provided.
- 7. An informal conference was held on 24 May 04.
- 8. The case was referred for formal hearing on 16 Jun 04.
- 9. Claimant had an average weekly wage at the time of injury of \$1,265.34 with a corresponding compensation rate of \$843.56.
- 10. Claimant has received temporary total disability benefits at a rate of \$843.56 per week from 17 Sep 02 through 11 Nov 02 and from 02 May 03 to present and continuing.⁶
- 11. There are no outstanding past compensation benefits.

ISSUES

- 1. Compensable Injury⁷
- 2. Nature and Extent of Injury
 - a. Whether Claimant is entitled to continued temporary total disability benefits.
- 3. Third-party settlement
 - a. Whether Section 33(g) bars Claimant from recovering under the Act.

⁶ There are no periods of past compensation. By settlement of his federal court case, Claimant received all back compensation benefits and benefits were to continue to be paid until issuance of this decision.

⁷ The parties stipulated to accidents occurring on 06 Feb 01 and 02 Mar 01, however, Carrier disputes that an accident occurred on 16 Sep 02 which gave rise to a disability under the Act.

FACTUAL BACKGROUND

This case presents claims for three separate injuries on 06 Feb 01, 02 Mar 01, and 16 Sep 02. However, Claimant has a history of head injuries prior to 06 Feb 01. In 1997, Claimant hit his head on a scaffold. In 1999, he hit his head on an air conditioning unit and lost consciousness for some unknown period of time.

On 06 Feb 01, Claimant was struck in the head with a chain sling. On 02 Mar 01, a hatch cover fell on Claimant's head. Although disputed by Carrier, Claimant alleges that he hit the top of his head on a sewer valve on 16 Sep 02. Claimant alleges that he sustained brain injuries resulting in attention deficit and anger management problems which rendered him disabled and entitled to continued compensation benefits. There is a dispute as to whether Claimant actually sustained compensable injuries or any disability due to any one of the accidents or through the cumulative effects of his accidents.

Employer was self-insured for coverage under the Act for the 06 Feb 01 and 02 Mar 01 accidents and insured by Signal for the alleged 16 Sep 02 accident. Claimant initially filed a tort suit in federal court. On 18 Apr 05, the court granted Employer's motion for summary judgment, dismissing all parties except for the 905(b) claim against AEP Elmwood LLC (Elmwood) for the 06 Feb 01 accident. Claimant then reached a settlement agreement with Employer related to the cause of action against Elmwood for the accident which arose on 06 Feb 01. Claimant provided a release to Employer on 23 May 05 and an LS-33 was signed on 03 Jun 05 by Employer as self-insured. The parties agreed to settle the federal tort suit for \$86,043.12 in past benefits under the Act from May 2003, the date of termination. Compensation benefits would continue to be paid at a rate of \$843.57 through the date of this decision, with a credit for money earned by Claimant during that period. In addition, Employer agreed to pay past medical expenses amounting to \$21,346.75 and continued medical expenses for treatment with Dr. Ginzburg, Dr. Weisberg, and Dr. Wakeman. In consideration for this settlement, Claimant agreed to release all claims related to past compensation and medical benefits under the Act.

POSITION OF THE PARTIES

Section 33(g)

Carrier contends that Claimant is barred from further recovery because he failed to obtain its written approval for the settlement of the third party action. Carrier further contends that the case settled for less than what Claimant is entitled to and therefore its liability for future compensation and medical benefits should be terminated. Claimant responds that Carrier has no standing to object because Carrier was not an insurer under the Act for the only remaining viable claim after the district court granted the motion for summary judgment. Claimant contends that Carrier only provided coverage for the 16 Sep 02 accident and therefore Carrier's written approval of the settlement was unnecessary. Claimant further argues that Carrier was not prejudiced by the settlement. Employer agrees with Claimant and contends that Carrier's consent was not relevant with respect to the settlement because (1) the only remaining third party tort claim was against Elmwood and the 06 Feb 01 accident, (2) Carrier was not Employer's

compensation insurer for that incident, and (3) Carrier never had any exposure to pay benefits in connection with that accident. However, if the Court finds that Carrier's liability ends based on Section 33(g), then Employer contends that it is entitled to the identical relief. Claimant contends that Employer's alternate argument is "off-point," "contrary to law," and "contrary to public policy."

Compensable Injury

Claimant contends that he sustained several head traumas which resulted in a psychologically disabling condition that prevents him from returning to work. In the alternative, Claimant contends that the cumulative effects of multiple concussions have exacerbated, aggravated, and/or precipitated a pre-existing low stress tolerance that led to the development of profound and disabling behavioral changes. Claimant contends that he is permanently, totally psychologically disabled and that related psychological, psychiatric, and neuropsychiatric treatment is medically necessary.

Employer admits that accidents occurred on 06 Feb 01, 02 Mar 01 and 16 Sep 02, but denies that Claimant sustained any compensable injury based on the fact that there were no objective findings of any brain injury. Employer further contends that any problems Claimant has with attention deficit or anger management were pre-existing in nature and/or are manifestations of Claimant's personality. However, if the Court finds Claimant disabled, then Employer contends that the disability relates to the cumulative effects of multiple head injuries which culminated in, at most, a temporary disability status after the 16 Sep 02 accident.

Carrier admits that accidents occurred on 06 Feb 01 and 02 Mar 01, but denies that a 16 Sep 02 accident occurred. Carrier further contends that there is no medical evidence of brain damage or injury. Carrier contends that Claimant has no disability and that any problems Claimant has were pre-existing. Carrier rejects any claim that there is evidence of an aggravation or pre-existing conditions. Therefore, even if the Court determines Claimant suffered a compensable injury, Carrier contends it is not liable as it did not provide coverage for Employer at the time of the 06 Feb 01 or 02 Mar 01 accidents.

Section 8(f) Special Fund Relief

Finally, if Claimant is able to prove that an accident occurred in September 2002, that he somehow aggravated a pre-existing condition, that he could not return to work, and he is not precluded from recovery against it under Section 33(g), then Carrier contends that it is entitled to Special Fund relief.

LAW

Compensable Injury

It has been consistently held that the Act must be construed liberally in favor of the claimant.⁸ However, the United States Supreme Court has determined that the "true-doubt" rule,

⁸ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,⁹ which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.¹⁰

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.¹¹

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.”¹² In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.¹³ The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.¹⁴

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which ***could have caused*** the harm or pain.¹⁵ These two elements establish a *prima facie* case of a compensable “injury” supporting a claim for compensation.¹⁶

A claimant’s credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.¹⁷

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant’s condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.¹⁸ “Substantial evidence” means evidence that reasonable minds might accept as adequate to

⁹ 5 U.S.C. § 556(d).

¹⁰ *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff’d* 900 F.2d 730 (3rd Cir. 1993).

¹¹ *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh’g denied*, 391 U.S. 929 (1968).

¹² 33 U.S.C. § 902(2).

¹³ 33 U.S.C. § 902(a).

¹⁴ *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

¹⁵ *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff’d sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

¹⁶ *Id.*

¹⁷ *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

¹⁸ *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).

support a conclusion.¹⁹ Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).²⁰ The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.²¹

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.²² If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.²³ The presumption does not apply, however, to the issue of whether a physical harm or injury occurred²⁴ and does not aid the claimant in establishing the nature and extent of disability.²⁵ In addition, a psychological impairment can be an injury under the Act if it is work related.²⁶ It has been repeatedly stated that employers accept their employees with the frailties which predispose them to bodily injury.²⁷

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain.²⁸ A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition.²⁹ Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does.³⁰ The application of the aggravation rule is well settled in cases involving multiple injuries.³¹ However, a Claimant cannot claim aggravation when the disability resulted from the natural progression of a prior injury and would have occurred regardless of the presence of a second injury.³² If the disability resulted from the

¹⁹ *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

²⁰ *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

²¹ *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

²² *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

²³ *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267.

²⁴ *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

²⁵ *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

²⁶ *Director, OWCP v. Potomac Elec. Power Co.*, 10 BRBS 1048 (D.C. Cir. 1979).

²⁷ *Britton*, 377 F.2d at 147, 148.

²⁸ *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

²⁹ *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981).

³⁰ *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).

³¹ *Berry v. Southern Maintenance & Repair*, 2004 WL 2331292 (DOL Ben.Rev.Bd 2004) (unpublished), citing *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981).

³² *Lawrence v. Newport News Shipbuilding and Dry Dock Co.*, 2002 WL 31039495 (DOL Ben. Rev. Bd. 2002) (unpublished), citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986); see also *Abbott v. Dillingham Marine and Manufacturing Co.*, 14 BRBS 453 (1981) *aff'd mem sub. nom. Willamette Iron and Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

natural progression of the first injury then the carrier at risk at the time of the first injury is liable. If the disability is a result of an aggravation of the first injury, then the carrier at the time of the second injury is liable for the totality of the resulting disability.³³

Injuries that are not caused by discrete incidents, but rather gradually produced by work activities, fall under the aggravation rule.³⁴ The last aggravation does not have to be the primary factor in the disability.³⁵ If the last aggravation combined with the previous condition in an additive way to result in greater overall impairment, the last employer/carrier is liable.³⁶ “If the worker’s ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer[carrier].”³⁷

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.³⁸

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.³⁹ Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an “incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”⁴⁰ Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.⁴¹ Thus, disability requires a causal connection between a worker’s physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery

³³ *Berry*, 2004 WL 233129 (citations omitted).

³⁴ *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991).

³⁵ *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812 (9th Cir. 1966).

³⁶ *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991).

³⁷ *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.2d 1102 (9th Cir. 2003).

³⁸ *Black & Decker Disability Plan v. Nord.*, 123 S.Ct 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability “unless contradicted by substantial evidence to the contrary)); *Rivera v. Harris*, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of the non-treating physicians).

³⁹ *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

⁴⁰ 33 U.S.C. § 902(10).

⁴¹ *Sproull*, 25 BRBS at 110.

merely awaits a normal healing period.⁴² A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.⁴³ Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.⁴⁴

The question of extent of disability is an economic as well as a medical concept.⁴⁵ To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.⁴⁶

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.⁴⁷ Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.⁴⁸

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.⁴⁹ Medical care must also be appropriate for the injury.⁵⁰

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.⁵¹

⁴² *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

⁴³ *Trask*, 17 BRBS at 60.

⁴⁴ *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.

⁴⁵ *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

⁴⁶ *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

⁴⁷ *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

⁴⁸ 33 U.S.C. § 907(a).

⁴⁹ *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

⁵⁰ 20 C.F.R. § 702.402.

⁵¹ *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.⁵² Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.⁵³

Section 33(g) and Third Party Settlements

Employees injured under the Act who may also have a cause of action against a third-party as a consequence of the same injury are not required to choose one remedy over another.⁵⁴ Whether or not a third-party is liable in damages or a third-party suit settled by an employee was meritorious is beyond the scope of the administrative law judge's authority and he is not required to look beyond the pleadings and the result.⁵⁵

In the case of injuries caused by the negligence of a vessel, the vessel itself qualifies as a third person and a covered employee may seek damages against it in accordance with Section 33.⁵⁶ That applies even if the owner of the vessel is the employer.⁵⁷

However, if the employee exercises the right to seek damages from a third-party, the Act protects the derivative rights of the employer and carrier.

(1) If the person entitled to compensation . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation . . . The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical

⁵² *Ballesteros*, 20 BRBS at 187.

⁵³ *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).

⁵⁴ 33 U.S.C. §933(a).

⁵⁵ *Marmillion v. A.M.E. Temp Svcs.*, BRB No. 05-0543 (Mar. 23, 2006) (unpublished).

⁵⁶ 33 U.S.C. §905(b).

⁵⁷ *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983); *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).

benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.⁵⁸

The failure to obtain the required approval does not void *ab initio* the settlement agreement.⁵⁹ The language of Section 33(g) has been strictly interpreted and applied to employees notwithstanding harsh results. It requires prior approval even if, at the time the employee settles with a third-party, the employer is neither paying compensation to the worker nor subject to an order to pay under the Act.⁶⁰ It applies even when the employer/carrier has contracted with the third-party to waive their subrogation rights to recover benefits already paid.⁶¹ The employer/carrier's right to set-off the amount of the settlement against future payments is independent of the right to subrogation.⁶²

In a case where the claimant settles a negligence action against multiple third-party defendants, including the employer as one of the third-party defendants, the employer's involvement and signature on the settlement may be sufficient to partially comply with the Section 33(g) requirement.⁶³ "[T]he purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly ensured, by its own action, the protection of its offset rights."⁶⁴ However, even that will not satisfy Section 33(g) in its entirety if the carrier's written approval is not obtained, particularly if the longshore carrier is not the carrier on the third-party action.⁶⁵

The employer/carrier bears the burden of proof under Section 33.⁶⁶

Section 8(f) Relief

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim.⁶⁷

⁵⁸ 33 U.S.C. §933(g).

⁵⁹ *Rogers v. Trico Marine Assets, Inc.*, 969 F.Supp. 384, 389 (E.D. La. 1997), *affirmed*, 165 F.3d 24 (5th Cir. 1998).

⁶⁰ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 471 (1992).

⁶¹ *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 645 (5th Cir. 1986).

⁶² *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 246 (5th Cir. 1988).

⁶³ *Deville v. Oilfield Industries*, 26 BRBS 123 (1992); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 63 (1997).

⁶⁴ *Deville v. Oilfield Industries*, 26 BRBS 123, 131 (1992) (*citing I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 242 (4th Cir. 1992) (written approval requirement of Section 33(g)(1) is not applicable where employer directly participates in the settlement negotiations and aids in arriving at a settlement which is to its benefit).

⁶⁵ *Mapp v. Transocean Offshore USA Inc.*, 38 BRBS 43 (2004).

⁶⁶ *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 973 (4th Cir. 1992).

⁶⁷ *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the current disability is not due solely to the employment injury.⁶⁸

Special fund relief applies when the pre-existing impairment contributes to claimant's greater degree of disability since the initial impairment may have a cumulative effect, adding to the disability to make it greater than what the subsequent injury would have caused on its own.⁶⁹

EVIDENCE AND ANALYSIS

Claimant's Statement⁷⁰

Claimant is a 40 year old man. While working for Employer, as a port engineer aboard the M/V Mississippi Star, Claimant sustained an injury on 16 Sep 02. Claimant was fixing a fuel spill. Claimant investigated to determine whether the damage was internal or external. He got assistance with his work from Charles Reverance because Claimant had a lifting restriction. Claimant's doctor had placed him on light duty, with lifting restrictions, because an MRI showed a missing vein in Claimant's head.⁷¹ He was walking along the deck which has a line running about 5 ½ feet overhead and he ducked to get under the sewer valve. There was enough light and he could see alright. There was some water and oil residue that tracked with his feet, but he did not think he slipped or fell. He believes he hit his head and was knocked out.⁷²

He could not recall exactly what happened because he lost consciousness. Even though he blacked out, Claimant recalled that he ducked to get under the sewer valve. The next thing he remembered was getting picked up off the deck. He assumes he hit his head on the valve. He remembers jamming his neck, but that was after the fact. All he could say was that he bent down to get under the valve, but apparently did not bend far enough because he did not clear his head. He was helped off the deck by two men. They asked Claimant if he was okay. Claimant felt weak in his legs. He sat down and tried to get his "senses." He was helped out of the engine room onto the deck where he sat until he felt a little more sure of himself. He told his co-workers that he needed to go to the hospital. He was worried because of his past head injuries and because he knew he did not hit his head very hard, yet he still lost consciousness. He "walked in stages" to the parking lot. Mr. Reverance drove him to the River Parish Hospital.⁷³

⁶⁸ 33 U.S.C. §908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'g* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).

⁶⁹ *Pecoriello v. Caddell Dry Dock Co.*, 12 BRBS 84 (1980); *Sims v. Singleton Elec. Co.*, 9 BRBS 1068 (1978).

⁷⁰ EX-42 (a recorded statement taken regarding the 16 Sep 06 accident from Claimant by claims adjuster Thomas Brooks).

⁷¹ EX-42, pp. 1-9.

⁷² EX-42, pp. 9-11, 13.

⁷³ EX-42, pp. 11-12.

The doctor at the emergency room ran several tests. The CT scan did not show any trauma. The emergency room doctor told him to go see a company doctor and his neurologist before returning to work. The doctor continued Claimant's current medications.⁷⁴

Claimant also discussed his past injuries with the claims adjuster. In 1986, Claimant got degreaser in his left eye when the suds from the vent fan blew up onto his forehead and went underneath his goggles. He gutted his left thumb in 1988 or 1989, but he did not see a doctor and did not leave the vessel. Around June 1988, a scaffold fell and hit him in the head. He lost consciousness after this incident, but did not treat with a doctor. He was shaken into consciousness, then sat and rested. He felt weak and had double vision for about five minutes. He also had a headache. He did not have any further symptoms after that head injury. In 1999, he broke out into a rash and hives which cleared up through treatment with steroid patches. He also walked into an air conditioning unit in June 1999, knocking himself out again. He did not see a doctor after this incident either. He was helped up by one of the shipyard workers and reported the incident to Employer. He had a headache for a while, but it went away.⁷⁵

On 06 Feb 01, Claimant was struck in the head by a bit from a crane. Everything "went white." He did not believe that he was unconscious for a long period of time, but when he awoke, he had "rage." He kicked the engine and threw things. He saw a doctor after this incident and treated with Occupational Health at River Parishes Hospital. He did not lose any time from work because of this incident.

Shortly thereafter, on 02 Mar 01, Claimant was hit in the head when a hatch cover fell onto his head. He believed the hatch fell because the boat started rocking from a wave. This time he was wearing a hard hat. He received treatment at River Parishes emergency room.

In addition to these injuries, Claimant also had a couple of instances with his heart racing (which was later diagnosed as super ventricular tachycardia). These instances of tachycardia occurred in May and June 2001. He received treatment from Dr. Bouchact, his primary care physician, who referred Claimant to a cardiologist, Dr. Cefula. In July 2002, Claimant became dizzy and treated at River Parishes Hospital for heat exhaustion and dehydration. The doctor told Claimant to take a couple of days off work, but his supervisor, Tom Cornwell, told him to come back to work because they were short handed at the shop. Claimant tried to return to work at light duty.⁷⁶

Tom Cornwell ordered Claimant to undergo anger management therapy because of different instances on the job where he blew up. Claimant started anger management after his 2001 heart problems, but he could not recall exactly when. Claimant returned to Dr. Cefula in the summer of 2002 to change his heart medication because his therapist

⁷⁴ EX-42, pp. 12-13

⁷⁵ EX-42, pp. 13-16.

⁷⁶ EX-42, pp. 16-19.

suggested that the medication may be the problem. He was taking Cobaral, which Claimant believes caused his depression. That is also when Claimant decided he wanted to see a neurologist. Mr. Cornwell advised Claimant's therapist that around the time of Claimant's head injuries is when he really considered that Claimant had a big problem with his anger management. Claimant told his anger management therapist about his head injuries and that he knew he was not right after the February 2001 injury. Mr. Cornwell told him that he "wasn't right" and Claimant knew it too. Claimant felt disoriented and told his claims manager, Mr. Huntly, that he wanted to see a neurologist. Mr. Huntly set up treatment with Dr. Freiberg.⁷⁷

Claimant began treating with Dr. Freiberg in the summer of 2002. Dr. Freiberg took MRIs of his head and neck. He also did blood work and sent Claimant for an EEG. The diagnostic tests revealed that there was a blocked artery in Claimant's neck which did not allow blood to flow through it. However, it was not showing upon the MRI. The MRI did show "a couple of stops like a stroke. He said it was stroke." He also had problems with left toe numbness and some eye twitching. Dr. Freiberg ordered an MRA to determine the velocity of the blood. The MRA showed that the blood was not flowing. At that time, Dr. Freiberg referred Claimant to Dr. Dawson to evaluate the blocked artery. The tests revealed that Claimant did not have a hole in his heart. Because the emergency room doctor after Claimant's September 2002 injury advised him not to return to work until he saw a neurologist and a company physician, Mr. Cornwell would not return Claimant to work until he got clearance.⁷⁸

Claimant denied having any pain in his head. His neck feels like it has a "crick" and cracks when he moves it. He admitted seeing an attorney after being sent to anger management because he thought it was "unjust."

Lay Witness Testimonial Evidence

Claimant's mother⁷⁹

Claimant lived with her until he was about twenty years old. He continued to live in the same geographic area until about 1999. She moved to Arkansas after her husband retired, but Claimant stayed in Louisiana. Claimant has always been a "very good boy" and always respected her. He never used profanity or got angry with her.⁸⁰

Prior to 1999, she never saw Claimant having outbursts of anger or getting into fights with other people. He was always "cool" and never showed any kind of anger. However, since then she has seen a lot of changes in Claimant. Before, if he ever felt

⁷⁷ EX-42, pp. 18-20.

⁷⁸ EX-42, pp. 19-21.

⁷⁹ Tr. 17-27.

⁸⁰ Tr. 19-20.

angry he used to just excuse himself. She witnessed a couple of outbursts in the recent past. She just stood back and let him get angry, but she mostly just heard about Claimant's rage problems. She admitted that she was not around much.⁸¹

Claimant originally lived in Denham Springs, but then moved to Reserve because he was working down there. She never went to visit him in Reserve, but saw him every time she came to Southeast Louisiana. Claimant needed her and her husband and they were there for him whenever possible. She specifically came down for Claimant on two occasions because he needed them - when he had heart tests and after his hernia operation - between 2002 and 2003.⁸²

She never went to Claimant's jobsite and never observed him interact with people at work. She could not say for sure that he did not have temper or rage control problems on the job. She had no first hand knowledge to dispute co-worker testimony that Claimant had anger management problems dating back to before his head injury from the chain sling. She was not aware that Claimant saw a clinical social worker between August 2005 and February 2006.⁸³

She did not recall signing a suspension/expulsion form⁸⁴ from Claimant's high school indicating that Claimant used profane language at the vocational skills center or having to go to the school to discuss it with his teacher. However, she admitted it was her signature.⁸⁵

Claimant lost about 150 pounds, but then gained it back plus more. It was around 2002, after he moved to Arkansas. She knew he purchased a bar, but she knew very little about it. She has no clue what happened. She knew he worked for a sugar mill, but did not know why he quit. She does not know of any particular topic that gets him angry, but when he goes to court or see his doctors he gets upset. She did not know of anything else that made him mad.

Claimant's father⁸⁶

Claimant lived with him and his wife until he graduated from vocational technical school and got a job working as a mechanic on boats. He was a "good kid" when he lived with them. It is very hard to see him now compared to then. He used to be able to talk to people and quiet them down. He could resolve situations, but now that is not the case. Now, if he gets on a subject you cannot talk to him. He does not "hear."⁸⁷

⁸¹ Tr. 17-21, 24.

⁸² Tr. 21-23.

⁸³ Tr. 23-24.

⁸⁴ CX-21.

⁸⁵ Tr. 25.

⁸⁶ Tr. 27-40.

⁸⁷ Tr. 27-28.

He first noticed a personality change after he was told about Claimant getting hurt in the head around 2002. He was not sure of the dates. He came down to Louisiana because he was told that Claimant had heart problems. The doctor told Claimant's father that he did not know why they were treating Claimant for heart problems. The doctor also told Claimant's father that Claimant is "as good as any person he's ever seen" and should stop all the medicine. This was one thing that made Claimant upset because he thought he had heart trouble. One time they were talking about Claimant's medical condition and Claimant "just suddenly doesn't seem to hear. He starts talking . . . and until he gets it all out he doesn't respond to anything." Claimant's father never saw episodes like this prior to Claimant getting hit in the head.⁸⁸

Claimant's behavior is different from what it used to be. Claimant father is not sure what triggers Claimant, but whatever it is, it sets Claimant off. Claimant hurts himself and is then exhausted. Sometimes Claimant does not see things right in front of him, other times he can go back to the same thing twenty times. It puzzles Claimant's father because he does not know what triggers the behavior. Claimant is only himself part of the time. They all thought he would get treatment and go back to work. When he went back to work, he had an episode at work and hurt himself. It was not reported and that is when Claimant's father started noticing the episodes were getting worse.⁸⁹

He observed one episode where Claimant became really angry and enraged. Claimant was telling him that his medication was not working and was putting Claimant to sleep for ten to twelve hours a day. They were just talking and Claimant got up and punched the wall, hurting his hand. He kept trying to talk to Claimant, but Claimant would not respond "until it was over with . . ." This happened around March 2005. He saw some other minor episodes, but since he knows some of the triggers he stays away from those topics. When Claimant starts talking about such topics, he tells Claimant he will talk to him later or to call back when things get better.⁹⁰

Claimant blows up when talking about his medical condition or treatment. Claimant's father hits a trigger and Claimant throws the phone and it is the end of the conversation. Claimant's father is not sure whether it was 2001, but noticed the difference after Claimant told him that he got hit in the head and had a problem with a plugged artery. Claimant is much different now. He will be calm, but once a trigger is hit, he does not respond and just continues with what is coming out of his mouth at the time.⁹¹

Claimant's father never worked with Claimant. He was never with Claimant on the jobsite. He never observed Claimant conduct himself around other people at work. He could not testify for sure that Claimant has not had anger or rage outbursts with people he works with prior to getting hit on the head. He never spoke with Claimant's

⁸⁸ Tr. 28-30.

⁸⁹ Tr. 30-31.

⁹⁰ Tr. 31-32.

⁹¹ Tr. 32-33.

co-workers about how Claimant was or what his personality was like. He had no evidence to dispute co-worker testimony that Claimant had anger management problems and temper outbursts even before he hit his head. However, he knows his son and the people his son “palled around with.” Claimant was a good kid and the suggestion that he had temper problems is ridiculous.⁹²

One of the topics that particularly angers Claimant is his medical treatment. Claimant was told that he would be fixed in a couple of years. Claimant gets sent from one doctor to another and they all say something different. Then he goes to the company doctor and he tells Claimant that he is all right. He went with Claimant to one of the company doctors, Dr. Adams. Dr. Adams asked Claimant what he wanted and Claimant responded that he wanted to “get fixed up, [he] want[ed] to be able to go back to work, [he] want[ed] to be able to resume a normal life.” When Claimant’s father read the doctor’s report it did not relay what Claimant said he wanted.⁹³

Claimant is also angry that Employer sent him back to work knowing full well that they intended to lay him off. Claimant felt he was mistreated because he was not getting the medical attention he needed to stop his outbursts. He started anger management, but it was cut off in the middle. The doctor told Claimant that he could continue anger management therapy if he paid for it himself. Claimant could not pay for the therapy because he was not working and had other outstanding medical bills.⁹⁴

Claimant had safety complaints against Employer. He felt that Employer “skirted around safety and if nothing happened, fine.” If an accident happened, then the person would be ridiculed. He was not happy with Employer’s safety procedures. Claimant complained because he would start to work the “safe way,” but a supervisor would come up and tell him to take a shortcut. Claimant’s father believed that when Claimant got hit in the head it was because of a shortcut he was told to take.⁹⁵

Claimant’s father recalled that Claimant worked for a sugar mill, Alma Plantation. He stopped working there because they had people working with immigration problems. Also, the ramp he had to run up was unsafe. Claimant told the foreman that someone was going to get hurt on the ramp. He found out that somebody went up the ramp with a front loader and the line collapsed, hurting the worker. Claimant was unhappy with the person who would not follow his recommendations for safety. Claimant knew the ramp would not hold the weight. Claimant stopped working there because he did not want to work at a place that put him in danger. It made Claimant angry when the person got hurt while going up the ramp. Claimant’s father assumed that Claimant quit. Claimant may have been fired, his father does not know.⁹⁶

⁹² Tr. 33-35.

⁹³ Tr. 35.

⁹⁴ Tr. 35-36.

⁹⁵ Tr. 36-37.

⁹⁶ Tr. 37-38.

Claimant had lost 150 pounds, but the medication made him gain it all back. Claimant's father could not recall when this weight loss occurred.⁹⁷

Claimant purchased a barroom because he was trying to find an occupation that he could handle. Claimant spoke to the person he leased it from, but was reminded that he was told that the highway would be shut off. The bar never really opened. Claimant was told to cut his losses and get out, which is what he did. He only had a small financial loss from buying the barroom because he already had the money saved up to buy into it. Claimant's father could not recall when this all happened. Claimant's father does not keep records of what his son does.⁹⁸

Claimant's father could not recall when Claimant got divorced. However, they were good friends before they got married and remained good friends after. "It was just two people that shouldn't have been married to each other." Claimant was only married for a short time. Claimant's father believes this all happened before he moved to Arkansas in 1999. Since 1999, he saw Claimant about once a year or so. However, he sees Claimant more frequently since Claimant's sister passed away because she is buried in Louisiana.⁹⁹

Claimant's ex-wife:¹⁰⁰

She was married to Claimant from 1995 to 1996, for about 1 ½ years. They did not have children together, but her two children lived with them. Their divorce was based on mutual consent. They saw things differently and could not find mutual ground. Anger problems were not the reason for their divorce. Claimant did not have anger problems during their marriage. He was pretty much calm, cool, and collected. He never threw anything or had fits of rage. He never struck her. She never called the police on him. She never had any kind of restraining order against him. She was not aware of any medical problems Claimant had during their marriage. He was not taking any medications either. She currently sees Claimant about four (4) or five (5) times per week either at her house or his.¹⁰¹

Claimant is no longer the person she knew. He used to be very nonchalant, easygoing, and nothing ever really upset him. Now, there are certain topics that she cannot talk to Claimant about, such as this case, attorneys, depositions, his Employer, or doctors. These are not the only topics that cause him to go into a rage, but they are the most severe. He starts screaming and becomes a totally different person. There is no specific topic that makes him angry, but if anything is out of the norm he gets angry and flustered. Everything has to be just right. He does not always become violent. He does get destructive. Claimant did not have these flustered events or temper/anger problems before his head injuries. She first noticed these changes about four (4) years ago in 2001.

⁹⁷ Tr. 38-39.

⁹⁸ Tr. 39-40.

⁹⁹ Tr. 40-41.

¹⁰⁰ CX-34.

¹⁰¹ CX-34, pp. 5-11, 22-23.

She is familiar with some of Claimant's accidents. She does not know after which accident she started noticing behavior problems.¹⁰²

Claimant helps with her son. He is wheelchair bound, but is mentally consistent with his age. Her son has spina bifida and when he gets upset "he'll start inhaling, constantly trying not to cry. And he'll cry and then that's it. There is nothing else you can do." Her son spends the weekend with Claimant and they do father-son things like go to the movies or play on the computer. Claimant also checks up on her son. Her father has a permanent restraining order against Claimant. She has nothing to do with her father. Claimant also has a permanent restraining order against her father. Her father cannot go anywhere near her house, job, or son. Her father once pulled a gun on Claimant. She could not testify as to what happened because she was at work.¹⁰³

In addition to his behavior problems, Claimant has trouble walking because his knees give out. He also has trouble seeing and anxiety attacks during which his chest hurts badly. Claimant will not see things right in front of him. She does not know what caused his problems walking or seeing. She has seen Claimant's anger outbursts and the results of the outbursts. His walls now have holes in them. He also has a collection of broken phones. He has anger outbursts at least once a week. She has never been to work with Claimant. She has no first hand knowledge of how Claimant acted at work before or after his accidents.¹⁰⁴

During their marriage, she was the one who had anger problems. She believes she hit Claimant once. She also threw a cookie jar at the floor in front of Claimant. They did not really have verbal altercations, but she was the one who "threw the fits." Claimant normally laughed and walked away. At some point, Claimant lost a lot of weight, but she did not recall him being depressed. Claimant lost about 180 pounds. She believes all he did was diet. She is not aware of anything in his life that affected him drastically enough to cause such a large weight loss. He lost the weight before September 2001.¹⁰⁵

She knows that Claimant went to work for Alma Plantation after he was terminated from Employer. He did not hold this job very long, at most one month. Claimant told her that he stopped working there because he could not handle the fact that the employer did not do what it was supposed to do. She does not have any firsthand knowledge of his work activities with Alma. She does not have any firsthand knowledge as to why he stopped working there. She knows that he went on job interviews, but when he told them that he may have to take off due to this litigation he was not hired.¹⁰⁶

¹⁰² CX-34, pp. 11-13, 24-25.

¹⁰³ CX-34, pp. 13-15, 17-18.

¹⁰⁴ CX-34, pp. 15-18, 26-27.

¹⁰⁵ CX-34, pp. 18-21, 23-24.

¹⁰⁶ CX-34, pp. 26-32.

She believes Claimant sleeps when he is not working. He also goes on the computer or watches television. He does not do housework or yard work. She does not know why he does not do his own yard work; just that Claimant tells her that he cannot. He has never done housework.¹⁰⁷

Claimant's ex-wife's son.¹⁰⁸

At the time of his 18 Aug 05 deposition, he was in the 12th grade. Sometimes he spends almost the entire weekend with Claimant. He also spends time with him during the week. They hang out around the house, play games, or go to the movies. He has known Claimant for many years. He has seen Claimant get real angry when he is on the phone and somebody aggravates him. Claimant screams and throws things. These episodes only started after Claimant injured his head. Claimant's ex-wife's son only heard about one injury to Claimant's head where "a crane or a boom or something to that affect hit him in the head." Before that accident, Claimant did not have episodes of yelling or throwing things.¹⁰⁹

He has noticed that Claimant's anger outbursts have become more frequent as time went on, especially "within the past few months." These outbursts mainly happen when Claimant is on the phone and someone aggravates him. He has not really seen anything else set Claimant off.¹¹⁰

Claimant's ex-wife's daughter.¹¹¹

She lived with her mother and Claimant while they were married. During that time, she never saw Claimant have anger outbursts or throw things. She still sees Claimant about once or twice a week because he visits her brother. She has noticed personality changes with Claimant since she lived with him. He has become short tempered and gets upset easily. There is nothing in particular that makes him angry. She started noticing these problems "a few months ago."¹¹² She saw him throw things, scream, and curse to the point where it scared her daughter. She never saw anything like that before.¹¹³

When she lived with him, she saw him all the time. After that, she probably saw him about once a week or once every couple of weeks. However, she never knew him to have any type of anger problems until she was about five (5) months pregnant with her son who was born on 17 Dec 04. Claimant took her brother to Home Depot. Her brother was hit by a buggy in the store. Claimant became upset and started cursing. Claimant got thrown out of Home Depot. Claimant's behavior escalated from there. She was not present for the incident, but Claimant and her brother came to the house after the incident

¹⁰⁷ CX-34, pp. 32-33.

¹⁰⁸ CX-35.

¹⁰⁹ CX-35, pp. 5-8.

¹¹⁰ CX-35, pp. 9-10.

¹¹¹ CX-36.

¹¹² The deposition was taken on 18 Aug 05.

¹¹³ CX-36, pp. 6-8.

looking for her mom. Claimant was still in a state of anger. He threw keys and cursed real loud. He kept pacing and would not get her brother out of the car. He wanted to call the cops. Her mom can calm Claimant down, but she was not there.¹¹⁴

She never saw other events where Claimant had an anger outburst.¹¹⁵

Claimant asked her to speak on his behalf at trial, but he did not tell her what to discuss. He does not give her money or buy her things. Claimant was never abusive to her mother and her mother was never abusive toward Claimant. She never witnessed her mother having an anger outburst. She has never been with Claimant while he was at work. She is not aware of any medical or psychological problems Claimant might have had while married to her mother. She knows Claimant started treating with doctors after his work accident, but she did not know to what extent.¹¹⁶

Richard W. Peters:¹¹⁷

He has been best friends with Claimant since they were 14 years old. They have been like brothers their whole lives. He is aware that Claimant had numerous head injuries at work. He has personally seen a change in Claimant's personality over the years since those incidents. Claimant has become more hostile and is easily set off. He first noticed these changes about 3 ½ to four (4) years ago. He is not sure after which accident he started noticing changes in Claimant's attitude. Claimant was working a lot of overtime when the accidents started to happen and they did not see a lot of each other during that period of time. Claimant was still working fulltime when Mr. Peters noticed the change in Claimant. He is sure that it started before the last accident because of the confrontations Claimant started having at work.¹¹⁸

Employer made Claimant go to anger management classes even though up until the accidents he never had a problem with anger. He has known Claimant for 25 years and the only time he ever saw Claimant upset was his first year of high school because a guy in his industrial arts class kept "messing with him." That was the only time he has ever seen Claimant riled. He was not aware of any times where Claimant had a physical altercation with his ex-wife.¹¹⁹

He probably sees Claimant about once a week. He has seen Claimant have anger outbursts since his work accidents. They depend on what someone talks to Claimant about. Claimant gets frustrated regarding this case. If it is a situation that Claimant cannot control, he gets upset. Claimant is afraid of social gatherings because he worries that somebody will set him off. As a result, he tries to avoid social gatherings.¹²⁰

¹¹⁴ CX-36, pp. 8-11.

¹¹⁵ CX-36, pp. 11-12.

¹¹⁶ CX-36, pp. 9-10, 12.

¹¹⁷ CX-37.

¹¹⁸ CX-37, pp. 6-9.

¹¹⁹ CX-37, pp. 9-10.

¹²⁰ CX-37, pp. 9-11.

Claimant has tried to obtain work. He tried working at a sugarcane farm. He thinks Claimant only worked there for about one month. Claimant left that job because he thought the job was unsafe and he got to a point where he could not control his anger outbursts.¹²¹

When they were in high school together, Claimant would come and work in the shop where Mr. Peters' father worked. However, they have never worked together as adults. He has never been with Claimant at his place of work. He has no personal knowledge as to whether Claimant had any anger outburst problems at work before he suffered his head injuries. Since he was not at work with Claimant, he could not dispute it if Claimant's co-workers testified that Claimant had anger problems before his 2001 accident. Claimant originally stopped working for Employer after he was put on medical leave because of his anger problems. Claimant went back to work on light duty after his doctor released him, but then got laid off about three (3) or four (4) weeks later.¹²²

He has noticed Claimant's condition worsen since the personality changes began. He does not see the outbursts as often because Claimant is not around people like he used to be. There has been a change in the way Claimant interacts with people. Mr. Peters used to believe Claimant was a person he could trust to raise his children, including his autistic son, but now, he would not leave his children with Claimant. Claimant's ability to deal with people has decreased. He used to be a people person and interact with kids very well. It was Claimant who always calmed Mr. Peters down while they were growing up. Claimant always kept him in check. Claimant is no longer that person. He saw Claimant's condition worsen when Employer tried to treat his injury as an anger issue. Instead of getting Claimant the proper medical attention, Claimant was sent to learn how to cope with his anger. The root of Claimant's problem was never addressed. Claimant's condition has worsened because Employer never addressed the root problem. The way Claimant is currently, Mr. Peters does not believe he could return to a working environment where he had to deal with people on a regular basis.¹²³

He knows how Employer handled Claimant because after Mr. Peters and his wife separated three years ago, he lived with Claimant for about six (6) to nine (9) months. He also saw a lot of changes in Claimant during that period. Claimant's condition worsened before he was terminated. He believes Claimant's worsening condition is why Claimant is no longer employed. Since Claimant limited his contact with people after he stopped working, it is difficult to say if his condition continued to worsen. Mr. Peters wants to say that it has worsened "[b]ecause even in public places, if somebody sets him off, he can get very violent."¹²⁴

Although he did not see Claimant as often after Claimant moved to Reserve in 1997 through 1999, they continued to talk. He would see Claimant about once a month. He does not know what Claimant did in Reserve when he was not working. He did not

¹²¹ CX-37, p. 11.

¹²² CX-37, pp. 11-14, 21.

¹²³ CX-37, pp. 14-17, 22.

¹²⁴ CX-37, pp. 17-19.

know whether Claimant lived with someone. He believes that while Claimant lived in Reserve, another person that worked on the boat stayed with Claimant. He did not know whether Claimant had any business activities outside of his work while living in Reserve. They mostly talked about Claimant's place in Denham Springs.¹²⁵

Calvin W. Sevario, Jr.:¹²⁶

He grew up with Claimant. They have been friends since they were 12 or 14 years old. They lived down the street from each other and grew up together. However, when they were about 18 years old they went their separate ways. They have seen each other about once a year, over the past 10 years. In fact, he has not seen Claimant for about one year prior to his deposition on 18 Aug 05. He has not personally noticed any type of personality change in Claimant. He has heard people talk about anger management problems, but has not witnessed any outbursts himself.¹²⁷

From the time they first met as teenagers up until about five years ago (2000), Claimant never exhibited anger management problems. He has not personally experienced any anger management problems from Claimant in the last five years either. Claimant may have asked him to be witness at trial, but he did not tell Mr. Sevario what particular topic he would be expected to testify about. Claimant told him about his accident, but Mr. Sevario could not remember the details. He would not know whether Claimant had any type of personality change over the past three to five years because he is very busy.¹²⁸

He has never worked with Claimant and has no firsthand knowledge about Claimant's behavior when he worked on the river. He knows that Claimant put in an application to work with him at motor assistance patrol (MAPS), but they mostly concentrate on hiring firefighters and policemen. He does not know if an offer was ever extended to Claimant because it was before Mr. Sevario was a supervisor. He does not know of any reason that Claimant would not have been hired other than he was not a policeman or fireman. They favor those types of applicants because of their previous training.¹²⁹

Matthew Huntley, Jr.:¹³⁰

He now lives in Georgia because he was displaced from his New Orleans' home after Hurricane Katrina. He has been retired since February 2005, but was employed by one of Employer's companies, Midland, since 1992. In 1998 and 1999, they were self-insured. He was a claims manager in Reserve, Louisiana. This is the same base of operations where Claimant worked. Mr. Huntley handled marine and longshore claims – investigated claims, evaluated them, and at some point negotiated settlements. He was

¹²⁵ CX-37, pp. 19-21.

¹²⁶ CX-38.

¹²⁷ CX-38, pp. 6-7.

¹²⁸ CX-38, pp. 7-9.

¹²⁹ CX-38, pp. 9-11.

¹³⁰ Tr. 42-63.

involved in the investigation, administration, and adjustment of Claimant's claims. He also arranged Claimant's medical treatment, monitored his work status, and instituted compensation benefits for lost time accidents.¹³¹

Mr. Huntley has known Claimant for roughly ten (10) years. He met him on the job, while Claimant was doing his daily tasks. He knew that Claimant was involved in work related accidents. He knew Claimant hit his head on a scaffold board in 1998, but that no report was made. He heard about this injury around the job. He also knew that in 1999, Claimant walked into an air conditioning unit that extended out from a window. This incident occurred on an outside open deck in daylight. According to the report, Claimant knocked himself out. Everyone joked about it because they did not know how it could happen since he traversed that area on a regular basis. Claimant's inattention caused the 1999 accident. A lot of Claimant's injuries occurred due to his inattention. Mr. Huntley could not recall when it happened, but Claimant walked right off the bow of a vessel and fell into the water. He cut his hands trying to pull himself out on a bulkhead. This was prior to his chain-sling and air-conditioner accidents. He is also familiar with the three additional accidents that are the basis for this claim. In February 2001, Claimant had a chain-sling incident. In March 2001, he had a hatch cover incident and in September 2002, he injured himself on an overhead sewer valve. Mr. Huntley was personally involved in monitoring the medical aspects of these claims. He was also responsible for investigating and monitoring Claimant's work status following each claim.¹³²

He monitors work status because it helps determine the severity of the injury and whether an employee will lose time because of an inability to work. If an employee loses time, then Mr. Huntley has to initiate benefits. Claimant reported and received medical treatment for the 06 Feb 01 injury. He did not lose time due to this accident. Since he did not lose time, Mr. Huntley did not institute payments of Longshore benefits. Claimant also reported and received medical treatment for his 02 Mar 01 accident, but it did not result in lost time either. No Longshore benefits were instituted regarding the 02 Mar 01 injury. It was a medical only claim. Finally, Claimant reported that on 16 Sep 02, he hit his head on a sewer valve aboard one of the boats. He received medical attention and lost time due to this injury. Weekly Longshore payments were instituted following this third accident.¹³³

Mr. Huntley participated in the September 2002 sewer valve accident investigation and interviewed witnesses. One of Claimant's co-workers was in the proximity when the incident occurred. He learned that Claimant bumped his head and fell to the deck of the vessel. He just confirmed that an incident happened. There was no question about the validity of the incident and benefits were initiated accordingly.¹³⁴

¹³¹ Tr. 42-44, 59.

¹³² Tr. 44-47, 52-54, 59.

¹³³ Tr. 47-50.

¹³⁴ Tr. 50-51.

When Mr. Huntley first met Claimant, he was a jovial type, kind of overweight, very pleasant, mannerly, polite, and respectful. He saw Claimant on a regular basis. At one point, Claimant lost an inordinate amount of weight and his demeanor changed. Claimant no longer smiled and looked like “he had the weight of the world on his shoulders.” Mr. Huntley would say hi to Claimant when he walked by, but Claimant would not see or hear him. Claimant used to have a “happy-go-lucky” smile, but it turned to a frown or a scowl. He just looked like a dark cloud was always around him. This all happened at least one year before the chain-sling accident in February 2001.¹³⁵

He heard that Claimant owned and operated a barroom around the same time of his weight loss and change in behavior. Mr. Huntley started hearing stories that Claimant hooked up with a lady that was supposedly a crack-head with AIDS. The weight loss concerned Mr. Huntley because he thought Claimant had AIDS. He made recommendations to his superiors that they look into it. He was concerned from both a business and personal standpoint since he was a co-worker. Nothing came from his recommendation. Claimant never related his weight loss to any of his on-the-job injuries.¹³⁶

Employer downsized in the past five years. It was an ongoing situation, Employer was gradually downsizing. After acquisition by Ingram, there was additional downsizing company wide. Claimant was not the only employee laid off. Claimant was released by Dr. Freiberg to full duty work on 21 Apr 03.¹³⁷ He was laid off¹³⁸ on 28 May 03.¹³⁹

Mr. Huntley had contact with Claimant whenever Claimant was onsite. They sometimes went to lunch together with a group of other people. Once Claimant’s personality changed, a lot of the guys they went to lunch with started distancing themselves from him. Mr. Huntley stopped going to lunch with Claimant prior to the February 2001 chain sling incident. Claimant started ignoring people, did not converse, and “was not a happy camper to be around.” Claimant never yelled at him personally, but Mr. Huntley heard rumors of him “losing [it] and going off at people.” To his knowledge, Claimant never attacked anyone while working. He does not have any personal knowledge, but he heard about Claimant through scuttlebutt.¹⁴⁰

Mr. Huntley was present for Claimant’s deposition in 2004. The deposition ended very abruptly because Claimant “lost it.” Claimant was being questioned about his lawsuit when he grabbed the conference room table and shoved it against Mr. Huntley and Employer’s attorney. They were jammed up against the wall. They made it out all right, but were scared of Claimant. He never saw such behavior from Claimant prior to February 2001. When he talks about Claimant’s personality changes prior to February 2001, he is just saying that Claimant became a little distant and stopped talking to people

¹³⁵ Tr. 52-55.

¹³⁶ Tr. 55.

¹³⁷ CX-22, p. 133.

¹³⁸ CX-22, p. 132.

¹³⁹ Tr. 55-59.

¹⁴⁰ Tr. 59-63.

as much as he did before. He had no knowledge of Claimant having rage or anger outbursts and attacking people. He could not state specifically that it started after February 2001, just that he never saw it before then.¹⁴¹

Thomas Cornwell¹⁴²

He currently works for Employer. He used to work for Orsouth, until it was acquired by Ingram. He worked for Orsouth in Reserve, Louisiana. Now it is called Triangle Fleet. Midland was the parent company of Orsouth and Capital Marine, the other Employers named in this suit. Ingram now owns all of the companies. He worked as a port engineer for Midland for a little over 25 years and it has been three (3) years since Ingram took over. He managed preventive maintenance, overhauls, dry docking and general vessel maintenance. His responsibilities also included supervising the mechanics and assistant port engineers, such as Claimant. He has known Claimant since about 1996.¹⁴³

He met Claimant when Claimant came off the line boats, which are big towboats that move barges from New Orleans up to St. Louis and other points across the country, and became an assistant port engineer for Employer. He was Claimant's immediate boss and was familiar with Claimant's day-to-day activities. He was aware that Claimant was involved in several work-related accidents and injuries that are the subject of this case. He was also familiar with Claimant's work status after his injuries. To his knowledge, Claimant reported and received medical attention following his February 2001 chain sling accident. This incident did not lead to any lost time. In addition, Claimant reported and received medical attention after his March 2001 hatch cover incident; however, he did not lose time for this accident either. It was considered a medical claim only. Finally, Claimant reported and received medical attention for his September 2002 sewer valve accident. Mr. Cornwell reviewed the 2002 accident report¹⁴⁴ that he prepared. The report was based on Mr. Cornwell's discussions with Claimant and witnesses. Claimant struck his head on an overhead pipe while checking starboard main engine. Claimant appeared to be dazed and weak in his legs. Claimant was taken to River Parishes Hospital as a result of the 2002 accident. Claimant did not return to work following this accident and was put on lost time status. Compensation benefits were paid thereafter.¹⁴⁵

Prior to the chain-sling incident, Claimant was a "very outgoing good boy. People liked him..." He was very cooperative and worked hard. However, from the time Claimant started working for Employer, there were complaints from the boats where he worked, that he had anxiety fits and would become outraged and yell. The captains of the towboats he serviced usually reported this behavior. This was around 1997 up through 1999. There were reports that Claimant threw tools and parts and kicked doors off of their hinges. Around 1999, co-workers indicated that they were frightened to work

¹⁴¹ Tr. 61-63.

¹⁴² Tr. 64-81.

¹⁴³ Tr. 64-66.

¹⁴⁴ CX-19.

¹⁴⁵ Tr. 66-70.

around Claimant. He personally observed changes in Claimant's personality over time. After a few years, around the time he lost a lot of weight and opened a barroom, he became very short-tempered. He had a different group of friends. Claimant used to always be focused on his job, but suddenly it was like he was not even there. He could not say for sure, but these changes began around 1999, however, not before the chain-sling accident. Regardless, Claimant continued to work his regular work activities, even after the chain sling and hatch cover incidents. It was not until his September 2002 sewer valve incident that Claimant could no longer return to work. However, at one point the doctors released Claimant to return to work and Claimant returned as an assistant port engineer, making the same wages and benefits he earned before his 2002 injury.¹⁴⁶

Mr. Cornwell denied ever telling Claimant to take shortcuts that compromised safety because "we take very much pride in our safety program."¹⁴⁷

Claimant's confrontation problems were significant enough to be put in an annual report. Mr. Cornwell completed several annual reports¹⁴⁸ regarding Claimant. The 03 May 00 annual report indicated that Claimant needed to improve communications with vessel personnel. An undated report reflected that Claimant needed development of more diplomatic communication skills with crewmembers to prevent confrontations. Claimant needed to learn how to communicate his problems without getting personal. Judging by the form, the undated report was from about 1998 or 1999. Ronnie Rogers was one of the men who complained about Claimant's anger problems. Mr. Rogers had difficulty working near Claimant. This was also around 1999.¹⁴⁹

There is nothing else in Claimant's personnel file between 1998 and 1999 regarding anger problems or difficulty getting along with other people. Although there were complaints from boat captains regarding Claimant's personality, he never got a letter from them for his personnel file. Nor did they request to put anything in his personnel file. The complaints only happened about three times a year, so Mr. Cornwell did not see a reason to put anything in Claimant's file. It is a big deal anytime someone has a problem with a boat captain, but he did not see the need to put something in Claimant's file about it.¹⁵⁰

Mr. Cornwell knew that Claimant went to anger management therapy in 2002. Mr. Cornwell was the one who referred Claimant to anger management after he threw a temper tantrum. Claimant threw items in the shop and kicked one door completely off the hinges. Mr. Cornwell talked to Claimant and explained that Employer could not handle that type of behavior. Mechanics were getting scared to work with him. Mr. Cornwell wanted to salvage Claimant because he was a good mechanic. He felt Claimant needed anger management to get to the bottom of his problem. He did not feel it was necessary to send him to anger management in 1999. In 2002, Claimant's problems

¹⁴⁶ Tr. 70-73.

¹⁴⁷ Tr. 72-73.

¹⁴⁸ CX-22, pp. 106-107, 113-114.

¹⁴⁹ Tr. 73-76.

¹⁵⁰ Tr. 76-77.

became too severe. Before the chain sling incident, he probably should have sent Claimant for anger management, but he felt that he could talk Claimant down. When he started kicking doors after the chain sling incident, Mr. Cornwell was afraid that Claimant would hurt himself or a co-worker. Before the chain sling incident he never tried to attack anybody, he never tried to throw a chair at anybody, and never flipped a conference room table. However, this was not the first time he heard Claimant kicked doors in. He heard about this type of behavior before the chain sling incident and the referral to anger management in June 2002 was almost one and one-half years after the chain sling incident. Claimant continued to do his regular work once he started anger management up until his September 2002 injury. Claimant was not attacking attorneys or throwing chairs through windows prior to September 2002 either.¹⁵¹

Ronnie Rogers.¹⁵²

He has worked for Employer for about nine (9) years. For the past three (3) years he has worked as a port engineer. Before that he was a mechanic. He had an opportunity to work with Claimant while Claimant was a mechanic. They worked under the same supervisor, Tom Cornwell. Claimant was a hard worker and “did pretty good work as a mechanic.” He never traveled with Claimant. He got along with Claimant “all right.” He was present when Claimant struck his head on a hook attached to a crane barge on 06 Feb 01. Everyone stood back and waited for the hooks to come down, but Claimant “came out of nowhere[sic] and walked right into the path of the swinging hook.” Claimant was struck in the back of the head. He went to the ground for “maybe a second.” When he got up he “went berserk.” Claimant started cursing and throwing things. This went on for about 30 to 40 minutes.¹⁵³

There were other instances where Claimant “went berserk.” Sometimes when Claimant worked in the shop he would get mad because things were not going his way. Claimant would kick doors open and start throwing things. Little things would make him mad. This happened more than five (5) times, but less than ten (10). He could not remember the first time he saw Claimant have an anger outburst, but said it was before he was struck with the hook. He started working with Claimant around 1999 or 2000. Therefore, it was around 1999 or 2000 that he observed Claimant having one of his episodes. He did not hear that Claimant had any kind of reputation before their first encounter. However, after his own experience with Claimant, he spoke with all of the lead men that Claimant dealt with and was told that it happened pretty often. No one indicated when the behavior started. Claimant’s behavior affected his ability to get his work done. Claimant also gets angry when someone else has a problem. He needs to walk away, putting his work on hold. He did not feel like he had to walk around on pins and needles when he was around Claimant.¹⁵⁴

¹⁵¹ Tr. 77-81.

¹⁵² CX-31.

¹⁵³ CX-31, pp. 5-9.

¹⁵⁴ CX-31, pp. 9-13.

Claimant's fits occurred if he ordered parts that did not come in or if a deckhand did not do something how Claimant told him to do it. Claimant would become real upset and slam down phones. He could not recall seeing any physical altercations involving Claimant. Mr. Rogers complained to Tom Cornwell about Claimant's behavior once. He could not remember when he made the complaint. He did not complain about Claimant to anyone else.¹⁵⁵

At the time of Claimant's injury, Claimant and Mr. Rogers were on the M/V Jane Clark and Mr. Ray Watson was standing on M/V Harvey III to tie the two barges together. Glenn Fontenot was operating the crane. They were moving an engine to load it onto a truck. Claimant was not involved in moving the engine. All Mr. Rogers needed was the crane operator, their flagman, and himself. Claimant injured himself while coming from M/V Harvey III onto M/V Jane Clark. He did not notice Claimant before he got hit because he was watching the hooks over his head. The hooks were about four (4) or five (5) feet above his head. The hooks were coming down at the time Claimant was hit in the head. The boom of the crane was more or less above the engine when Claimant got hit. Two hooks were being used to move the engine, but they were not hooked up to the engine when Claimant got injured. He did not know whether the boom of the crane was stationary when Claimant hit his head. The cables were moving back and forth. The cables were probably about seven (7) feet long by about four and one-half (4 ½) feet tall. Claimant was struck while walking. He could not testify as to what exactly happened because he was looking up, not below. He does not know how much the hooks weighed.¹⁵⁶

After Claimant was struck in the head, they grabbed the hooks to stop them from swinging. The crane operator raised the hooks after Claimant hit his head to get him out of the way and checked him out. The crane operator usually gives them a signal that the crane or cables are moving, but he did not remember if any warnings or signals were given prior to Claimant's injury. From where Mr. Rogers was standing, he could not see the spool of cable because it sits behind the operator. He never completed an accident report and nobody asked him to. He was asked what happened by the secretary, Vicky Luke.¹⁵⁷

T. Ray Watson:¹⁵⁸

He has been employed with Elmwood for about 12 years. He has been a welder supervisor for five (5) years. He has worked with Claimant very seldom because Claimant worked in the mechanic shop and they had different employers. Their contact mainly consisted of Mr. Watson going into the mechanic shop to get a tool or swap an engine for the mechanics. They had no other contact. He does not know Claimant's

¹⁵⁵ CX-31, pp. 13-15.

¹⁵⁶ CX-31, pp. 15-25.

¹⁵⁷ CX-31, pp. 25-33.

¹⁵⁸ CX-32.

performance or work habits. Claimant did not have a reputation around the company regarding the kind of worker he was. He never saw Claimant display any kind of anger or rage at the yard. The only time he saw Claimant upset was after he got hit with the chain on 06 Feb 01.¹⁵⁹

He witnessed Claimant's injury on 06 Feb 01. They were preparing to move an engine. They loaded the chain to pick up the engine and the crane started rocking. The chains started shaking and the crane operator blew the warning horn to let everyone know they should stand back until the chains calmed down. The crane operator blew the horn three (3) or four (4) times. Everyone stepped back, but then Claimant came out of nowhere and got knocked down by the chains. He does not know what Claimant was doing prior to the accident. They were not wearing radios. They communicated using hand signals. At the time of Claimant's accident the boom was at a complete stop, but the cables were still in motion. The crane was in position for at least ten (10) minutes before Claimant was hit in the head with the cables. The chains had stopped moving, but some boats passed and the movement of the water started the chains moving again. They were moving for at least five (5) minutes before Claimant ran out and struck his head. Mr. Watson did not fill out an accident report and he does not know if anyone else prepared an accident report. He was not interviewed about the accident and never gave a recorded statement.¹⁶⁰

Claimant was right in front of the engine (downriver end) when he was struck. Claimant passed Mr. Watson when he ran out. Claimant did not say anything as he passed him. The whole thing happened all of a sudden. The hook was made out of steel, but he does not know how much it weighed. The hook itself was about six (6) inches long. The hook was attached to the chain. Claimant was about one and one-half (1 ½) feet away from the engine before he got hit. It looked like Claimant was hit on his forehead. He could not recall whether Claimant was wearing a hardhat at the time. When Claimant got hit in the head, he fell back and then jumped up. Claimant did not lose consciousness. When he got up, he started throwing stuff at the engine. This did not go on for too long, maybe two (2) or three (3) minutes. He does not know Claimant well and did not spend too much time with him. Therefore, he could not testify whether Claimant behaved like that before. He has never personally seen Claimant behave like that. He assumed that Claimant "was real pissed off." He never heard of Claimant acting like that before.¹⁶¹

He may have spoken with the crane operator about how Claimant acted, but he was not sure. Mr. Fuhman was in charge at the time and he may have also told him about the incident and Claimant's behavior. He believes he told Mr. Fuhman that they were getting ready to move the engine when the chains began moving and that the

¹⁵⁹ CX-32, pp. 5-11.

¹⁶⁰ CX-32, pp. 11-28, 38-48.

¹⁶¹ CX-32, pp. 48-60.

mechanic got hit with one of the hooks. They seldom move engines, maybe once or twice a year. It is not part of their everyday operation. He never worked with Claimant again after this incident. He has seen him around the yard, but they have not spoken other than “hello.” He never asked Claimant how he was after the accident.¹⁶²

Glenn Patrick Fontenot.¹⁶³

He has worked for Elmwood Marine for about 14 years. He has been a crane operator for 16 years. He worked with Claimant about two (2) or three (3) times. He did not know him personally and never spent time with him outside of work. When they worked together they moved generators, engines, or clutches from boats. He has also asked Claimant if he could borrow a tool from the mechanic shop. They have never had any other contact. Claimant was not real sociable. He was not a people person. Claimant could never be pinned down to a conversation. He became real temperamental. Over the years, he has spoken to Claimant less than 20 times. He does not believe he spoke with Claimant after the 06 Feb 01 accident.¹⁶⁴

The only time he saw Claimant lose his temper was after he was struck in the head. Claimant’s behavior can be described more like agitated than actually losing his temper. Claimant used to be a heavy set man, but when he started losing weight he became real irritable and easily agitated. Claimant was not sociable. Claimant was never real sociable, but before his rapid weight loss he was not agitated when he spoke with people.¹⁶⁵

Prior to Claimant’s 06 Feb 01 accident, Mr. Fontenot noticed that the river traffic made his crane move and the chains started to swing. He stopped lowering the chains. He also blew the horn to warn the workers of the dangerous situation. He tried to get Claimant’s attention when he ran out, but it was like he was not coherent because it seemed like he ignored the warning to stay away from the danger and walked right into it. He is not sure where on the head the chain struck Claimant. Claimant fell to the ground. Claimant jumped right back up and started yelling and cursing. He could not see if Claimant fell all the way to the ground because the engine blocked his view. He could not hear everything Claimant said. Claimant yelled for about 20 or 30 seconds and then walked away. He does not know where Claimant went because he was watching his crane to prevent further dangers.¹⁶⁶

He did not complete an accident report. He did not give a statement to anyone. To his knowledge there was no investigation done regarding this incident. He did not know if any report was made at all. Mr. Fontenot was in the cab of the crane when Claimant struck his head. This put him about 40 or 50 feet from the engine. As far as he could see, the hook struck Claimant in the head. He does not know how much the hooks

¹⁶² CX-32, pp. 60-62.

¹⁶³ CX-33.

¹⁶⁴ CX-33, pp. 5-9.

¹⁶⁵ CX-33, pp. 9-12.

¹⁶⁶ CX-33, pp. 12-15.

weigh, but they are about six (6) inches long and four (4) inches across. His back was to the river and he could not see what type of vessels passed to cause the motion in the crane. The crane barge was moving because of the river traffic. This caused the chains to swing. It was a high traffic area and a busy day. Mr. Watson observed Claimant coming toward the engine before he was struck.¹⁶⁷

After Claimant was struck, he hoisted the chains up to a safer position. He then waited for everything to stabilize and settle down. It is normal for a boat to pass by and cause a wake that would cause the crane barge to move and the cable to swing. It can happen all day on a river. Claimant was facing the engine and based on that, it is likely that the hook struck Claimant either on the back of the head or the side, unless Claimant turned his head. He did not know what Claimant did because he was watching his chain slings and flagman. After Claimant was struck in the head, he fell backwards.¹⁶⁸

Medical Evidence – Reports and Depositions

Dr. Lon Boucvalt.¹⁶⁹

Claimant has treated with Dr. Boucvalt since age 17. Claimant first presented with a head injury on 05 Mar 01 after hitting his head on a door at work. He was wearing a hard hat at the time, but he jammed his neck. He was treated for a cervical strain and given Darvocet. Claimant requested a release to return to work and Dr. Boucvalt released him to return to work after one week. Claimant returned on 11 Jul 01 complaining of a “hard throb pulse” in his neck. Dr. Boucvalt did not provide any other treatment related to Claimant’s work injuries.

Dr. John Freiberg.¹⁷⁰

Claimant was referred to Dr. Freiberg by Employer. He was first seen on 26 Jul 02 for an evaluation of multiple head injuries. Claimant reported his first head injury occurred around 1998 when he hit his head on scaffold. He lost consciousness and awoke with double vision. It took several weeks, but he fully recovered from that injury. His second injury involved him hitting his head on an air conditioner. He again lost consciousness. He recovered from the second injury also and Claimant does not believe he was significantly injured. He reports the most significant head injuries occurred in 2001. He first hit the left side of his head on a chain and hook. Everything went white and Claimant lost consciousness. “He woke up angry.” He hit his head again about one year after this last injury. Although he had a hard hat on, his neck “jammed.” He did not lose consciousness after this accident, but was “badly shaken up” and “his legs became like jelly.”¹⁷¹

¹⁶⁷ CX-33, pp. 15-23.

¹⁶⁸ CX-33, pp. 23-33.

¹⁶⁹ CX-17; EX-20.

¹⁷⁰ CX-1.

¹⁷¹ CX-1, p. 1; EX-13, p. 27.

Claimant reported an “abrupt spell” three weeks prior to Dr. Freiberg’s evaluation. He got weak, lightheaded, disoriented, and stumbled after working in the heat. He went to the emergency room and was re-hydrated intravenously. Claimant reported that he has had some personality changes since his chain and hook accident. He reported anger problems and that his boss recommended anger management. He claimed this was a definite change in his behavior because he used to be mild-mannered. Claimant reported that he blows up over nothing, throws things, and slams doors. He also reported moderate pain and stiffness in his neck. He was not having many headaches, but his memory was foggy. Claimant’s anger manager thought Claimant was depressed and took Claimant off a beta blocker. This did not improve Claimant’s condition. Physical examination revealed that Claimant was alert and fully oriented, but showed flattened affect. Dr. Freiberg concluded that Claimant was status post multiple head injuries with behavior changes and a recent neck injury. He recommended an MRI of the brain and cervical spine.¹⁷²

Claimant returned for a follow-up on 13 Aug 02. He reported new concerns including forgetfulness, poor ability to control temper, and having anger outbursts. These problems were causing him difficulties at his job. Claimant also noticed problems paying attention. For example, while inspecting a broken engine, he failed to notice a large defect in the engine housing. He was “not registering things that he sees.” Physical examination again revealed Claimant was alert and oriented. The cervical spine MRI was within normal limits. The MRI of the brain showed Claimant had non-visualization of his right vertebral artery flow void and a nonspecific punctuate region of increased T2/flare signal in the left occipital lobe white matter. The non-visualization is worrisome for arterial dissection. The punctuate region in his occipital lobe is potentially a micro-stroke related to the non-visualization, as it is in the distal arterial runoff. Dr. Freiberg opined that Claimant was having neuropsychological difficulties status post head injury which may represent a sequel to head trauma or possibly a psychiatric disorder. He limited Claimant to no lifting more than fifteen (15) pounds. Dr. Freiberg sought authorization from Employer for an MRA of the neck and Circle of Willis and also reported Claimant’s lifting restriction.¹⁷³

Upon completion of ordered testing, Claimant returned to Dr. Freiberg on 05 Sep 02 with reports of poor energy, palpitations, numbness from the medial border of his left great toe to his toenail, and twitching of his left eyelid. Dr. Freiberg reviewed the MRAs of the neck and brain which was abnormal.

The flow signal in the right vertebral artery is noted up to the level of the V3 and V4 segment. However, no flow is evident distal to that. The flow proximal to the V4 segment is sluggish. The intracranial examination showed non-visualization of the right vertebral artery but was otherwise unremarkable.

¹⁷² CX-1, pp. 2-3; EX-13, pp. 28-29.

¹⁷³ CX-1, pp. 4-7; EX-13, pp. 25-26.

Dr. Freiberg concluded that Claimant probably had vertebral artery dissection. It appeared to be clinically stable. The abnormality was at the most common part affected by vertebral dissection. He referred Claimant to Dr. Dawson, an interventional neuro-radiologist, for further evaluation. He continued Claimant on light duty work.¹⁷⁴

Dr. Freiberg saw Claimant for a follow up on 18 Oct 02. Claimant was “not doing too well.” He continued to have mental foggiess. He also had another head injury when he walked into an overhead obstruction and lost consciousness. His head was sore for a few days, but that was essentially resolved. His neck remained sore and stiff. Claimant reported that he wants to go back to work. He was put on full leave until his issues are resolved. It was Dr. Freiberg’s impression that Claimant had neuropsychological difficulties status post multiple head injuries, but the etiology was not clear. Dr. Freiberg ordered neuropsychological testing. In addition, Claimant had a right vertebral artery occlusion, which was almost certainly related to his history of head and neck injuries. No other source was identified for the occlusion and for someone Claimant’s age, trauma is a common cause of this type of abnormality. As the artery is most likely completely occluded, it should not pose much further mischief. “Such disorders are generally not considered totally stabilized until six to 12 months have elapsed.” He recommended Claimant continue taking Aspirin. He also recommended that Claimant remain on no work status until his evaluations were completed.¹⁷⁵

Claimant did not return for a follow-up until 24 Mar 03. He was accompanied by his nursing case manager. Claimant followed Dr. Freiberg’s recommendations and had several other evaluations since their last visit. Claimant reported that his mental state was improved and he was not having difficulties with anger or confrontation. He reported that he still has problems with inattentiveness and sometimes does not see something in his direct visual field. All in all, he was “generally trending better.” He denied having headaches or neck aches, except for the occasional crick in his neck. He has not had any more mini-strokes. He admitted that he got lightheaded while stretching to use a tool. He also reported occasional palpitations. He was alert and oriented upon physical examination, but his affect was somewhat blunted. Claimant has not worked because light duty was no longer available with Employer. It was Dr. Freiberg’s impression that Claimant had improved. Although he had a right vertebral occlusion, it was likely in the late convalescent phase and appeared stable. Dr. Freiberg ordered repeat MRI and MRA. If everything came back stable, he would release Claimant to his regular duties.¹⁷⁶

Dr. Freiberg released Claimant to return to work with no restrictions on 21 Apr 03. Claimant returned for a follow-up on 02 Jun 03 and reported that he was “doing fair.” He did not report any new problems, but still had various cognitive difficulties, including inattention and mental foggiess. He denied any stroke like episodes. Claimant returned to work as recommended. He had some difficulties tolerating the work and he was soon laid off due to company wide downsizing. He was alert and oriented during his physical exam and had “pretty bright affect.” The repeat MRI/MRA showed

¹⁷⁴ CX-1, pp. 8-9; EX-13, pp. 23-24.

¹⁷⁵ CX-1, pp. 10-11; EX-13, pp. 19-20.

¹⁷⁶ CX-1, pp. 12-13; EX-13, pp. 17-18.

no changes. The radiologist initially reported the tests as normal, but after discussion with Dr. Freiberg, the radiologist “felt on further review that the right vertebral artery abnormality was still there and unchanged. Dr. Freiberg concluded that Claimant’s neurological status was stable. He also recommended that Claimant continue taking aspirin and return in about two months to check status.”¹⁷⁷

Claimant returned on 28 Jul 03. He denied having stroke like episodes, but admitted that he had episodes of slurred speech, vision loss, double vision, numbness, tingling, weakness, and clumsiness. He also reported difficulties with his visual attention and intermittent floaters in his eyes. Claimant has no prior history of ocular disorders. The dizziness occurred while he was digging. Claimant believes he was overheated. He denied any significant head or neck aches, but described occasional neck crepitations. Claimant stopped seeing his psychiatrist, Dr. Ginzburg, due to funding issues. Physical examination revealed that Claimant was doing about the same. Some of Claimant’s visual symptoms could be consistent with a retinal tear or detachment, but they sometimes occur after head injuries too. Dr. Freiberg “strongly recommend[s]” that Claimant go for an ophthalmologic evaluation. He urged Claimant to continue taking aspirin and to follow-up with his psychiatrist. After seeing an ophthalmologist, Claimant returned for a follow-up on 26 Sep 03 with continued complaints of difficulties seeing objects in plain view. No significant abnormalities were found. Claimant returned on 22 Oct 03 with continued visual inattention and mental foggiess. Dr. Freiberg ordered repeat MRI and MRA to assure stability of his vertebral artery lesion.¹⁷⁸

On 17 Nov 03, Claimant returned for a follow-up and reported mental foggiess and visual inattention. Dr. Freiberg reviewed the MRI of the orbits which showed no orbital abnormality. The MRA of the neck and brain as well as the MRI of the brain were stable. He had an absence of flow in his right vertebral artery from the V4 segment distally and had a single punctuate abnormality on his MRI of the brain, which was unchanged from previous tests. It was Dr. Freiberg’s impression that Claimant’s condition was stable and he had probable vertebral dissection.¹⁷⁹

Claimant returned for a follow-up on 20 Jan 04 and reported occasional pulsatile tinnitus. He continues to take daily aspirin, as recommended. He reported that his most significant problem is visual inattention and mental foggiess. He is hampered by these difficulties. Physical examination revealed that Claimant was alert and oriented, but his affect was a bit flattened. Claimant was status post vertebral dissection and was stable. Given the length of time since the onset of his problems, Dr. Freiberg felt that “further mischief from the disorder is unlikely.” He did not think that Claimant would need an additional MRI or MRA. Dr. Freiberg opined that “it would be prudent for [Claimant] to continue daily aspirin, and poses relatively low risk, for its significant prophylactic effects against stroke.”¹⁸⁰

¹⁷⁷ CX-1, pp. 14-16; CX-22, p. 132; EX-13, pp. 15-16.

¹⁷⁸ CX-1, pp. 17-19; EX-13, pp. 9-14.

¹⁷⁹ CX-1, pp. 20-21; EX-13, pp. 7-8.

¹⁸⁰ CX-1, pp. 22-23; EX-13, pp. 5-6.

Claimant last saw Dr. Freiberg on 20 Apr 04. When Dr. Freiberg entered the examination room, Claimant started screaming. He picked up a chair and smashed a large mirror in the room. He then picked up another chair and threw it through the glass window, shattering the glass onto the sidewalk. He also threw a chair in Dr. Freiberg's direction, but the doctor was not harmed. When Claimant started to cry and finally sat down, Dr. Freiberg was able to get out of the room. Claimant was arrested by the New Orleans Police. The police consulted with Claimant's psychiatrist, Dr. Ginzburg. Claimant was then committed to a psychiatric facility. Dr. Freiberg immediately discharged Claimant from the clinic and will not provide Claimant further treatment. Claimant had previously informed Dr. Freiberg that Employer/Carrier refused to cover his psychiatric treatment and medication. Dr. Freiberg opined that if that were true, then it would be a good idea to resume such treatment.¹⁸¹

Dr. Harold M. Ginzburg:¹⁸²

He is licensed as a physician in the State of Louisiana. He specializes in psychiatry and to a lesser extent, neurology. He was board-certified in psychiatry by the American Board of Psychiatry and Neurology in 1977. He is not board certified in neurology, but many of his patients deal with closed head trauma, seizures, and spinal injuries. He is also an attorney, but does not practice law in Louisiana. In Claimant's case, he consulted with two neurologists, Dr. Barrett and Dr. Weisburg. He would not defer opinions regarding Claimant's neurological conditions to Dr. Weisburg or Dr. Barrett. He feels like the data speaks for itself. If they disagree, then it is a professional disagreement. He would only defer to Dr. Weisburg's reading of the CT because that is one of his areas of specialization. But given the nature of Claimant's case, an entwining of neurology and psychiatry, he is not in a position to defer an opinion to another doctor.¹⁸³

Although Dr. Weisburg testified during his deposition that he thought Claimant's neurological testing was normal, Dr. Ginzburg believed that it was not a correct statement. The MRA and a number of other radiological studies, which Dr. Ginzburg was aware of and had not contradicted their readings, are abnormal as to occlusion of the vertebral artery. He does not believe Dr. Weisburg is saying everything is "normal" either. He "absolutely" disagrees if Dr. Weisburg said that the occluded vertebral artery could just as easily be congenital as it could be traumatic and had no real clinical significance. The literature states and it is Dr. Ginzburg's understanding that:

the occlusion of the vertebral artery in that particular area is usually associated with trauma . . . if it is associated with trauma, it certainly is consistent with [Claimant] receiving multiple blows to the head, so that [Dr. Ginzburg] think[s] it gives us an indication of the severity of the blows, whether or not there is any clinical evidence of a focal

¹⁸¹ CX-1, pp. 24-25; EX-13, pp. 2-4.

¹⁸² CX-2; CX-3.

¹⁸³ CX-3, pp. 5-7, 26.

neurological lesion, which is the way [Dr. Ginzburg] interpret[s] Dr. Weisburg's report. That is, the reflexes are symmetric. [Claimant] moves all four limbs. There is no slurring of speech. The cranial nerves appear to be intact. So in that sense, yes, [he] agree[s] with Dr. Weisberg. Based upon his history, [Dr. Ginzburg] would have to interpret the occlusion there is more consistent with closed head trauma.¹⁸⁴

He interprets patients' cognitive abilities for a living. He relies on neuropsychologists to collect the data, but sometimes he disagrees with how they interpret their own data. He did not administer any specific cognitive tests to Claimant because someone already administered a battery of tests at Dr. Greve's direction and there was no reason to repeat them. He "was trained to administer non-projective neuropsychological tests and routinely administer MMPIs," which are scored by an MMPI company. If one includes in cognitive ability the ability to focus, concentrate, and respond to questioning under pressure, then Dr. Ginzburg thinks that Employer's attorney "has eloquently demonstrated [Claimant's] inability to function in an appropriate cognitive manner."¹⁸⁵

The vast majority of people with concentration or attention problems from mild head trauma see a resolution of their problems within one year. However, the literature indicates it ranges upwards from ten (10) percent and up with long term effects beyond one year. Most people who lose consciousness one time are expected to recover. Individuals with one head trauma may have residual problems, but, from a historical perspective and what Dr. Ginzburg believes is Claimant's case, people with multiple head traumas do not fit into that category as well and may have prolonged deficits. It is not that people with multiple head traumas do not recover; it is that they are not expected to have as good of a recovery. For people with multiple concussions, there is evidence of impaired concentration and increased irritability. "Decreased attention span would be the broad strokes without any focal neurological signs . . ." such as is seen with Claimant. Even still, most of those cases also resolve within one year.¹⁸⁶

There are diagnostic tests and objective medical evidence showing physical damage to Claimant's brain. There was an abnormal MRI and MRA, documenting an occlusion of the right vertebral artery. Dr. Ginzburg did not know the exact dates of the MRI and MRA, but just that it was prior 06 Dec 02.¹⁸⁷

Dr. Ginzburg has never performed any research or medical studies involving people with anger management problems. He has not published any articles involving people with anger management problems either. The people he has treated with anger management problems have also included those having head traumas. A mild head

¹⁸⁴ CX-3, pp. 7-9.

¹⁸⁵ CX-3, pp. 9-11, 59-60.

¹⁸⁶ CX-3, pp. 11-13.

¹⁸⁷ CX-3, pp. 13-15.

trauma can include a period of unconsciousness or a concussion. A “closed head injury [indicates] a period of unconsciousness lasting more than five minutes, a period of posttraumatic amnesia that lasts more than twelve hours after the closed head injury, or a new onset of seizures that occurs within the first six months . . .” He has treated more than two hundred patients for anger management problems associated with mild head traumas.¹⁸⁸

Dr. Ginzburg takes a behavior that has occurred and tries to do a “lesson-learned” activity, teaching patients alternative non-violent ways of doing things. With the majority of his anger management problem patients, Dr. Ginzburg is able to improve their condition with medications and psychotherapy. If those patients were employed beforehand, he could sometimes get them back to a position where they could return to work. About ten (10) to twenty (20) percent were not able to return to work in a setting where they were around other people.¹⁸⁹

Dr. Ginzburg has “been attempting to treat” Claimant since October 2002. Employer’s attorney has interfered with attempts to treat Claimant. Employer has made allegations that Dr. Barrett, Claimant’s first neurologist, was not even a neurologist and refused to pay her bill. It has also refused to pay Dr. Ginzburg’s bill or Claimant’s medication costs. In addition, although treatment for therapy with Dr. Bushman was originally authorized, continued treatment was later denied by Employer. He had no criticisms about Dr. Bushman’s treatment. Dr. Greve is also in the same office. He usually has no problem with a patient seeing different doctors in the same group, but Claimant had a problem with Dr. Greve. Claimant believed Dr. Greve plotted against him. Dr. Ginzburg opined that if not for Counsel for Employer’s actions, Claimant would have clinically improved some time ago. Because of the difficulty imposed on Claimant to get treatment by Employer, Claimant felt he was an imposition and failed to regularly show up for his appointments. Dr. Ginzburg wrote a letter to Ms. Ducote outlining his problems with Dr. Greve and his treatment of Claimant.¹⁹⁰ Dr. Ginzburg even called Ingram directly to discuss the refusal of medical treatment and was advised that they were “involved in litigation.” He was also refused laboratory tests. It distracted from trying to treat Claimant. Claimant gets fixated on what he believes he is owed and on the way he has been treated. Claimant feels that he has been betrayed by many different people. As of May 2005, Claimant’s treatment was finally approved and Dr. Ginzburg located a therapist to treat him specifically for anger management issues. This way Claimant can get separate treatment for his medication and litigation issues. A lot of Claimant’s anger is directed towards his claims under the Act. He has trouble understanding the legal fine points in his case.¹⁹¹

Dr. Ginzburg is not sure how long it will take to get Claimant to a point where he could return to some form of employment because his problems have been going on for such a long period of time. “The longer someone has a problem, the more difficult it is to

¹⁸⁸ CX-3, pp. 15-17.

¹⁸⁹ CX-3, pp. 17-21.

¹⁹⁰ CX-2, pp. 37-39.

¹⁹¹ CX-3, pp. 21-23, 27-28, 78-79, 85-87.

treat.” He has had several screaming one-sided conversations with Claimant, but he may stop these rage attacks once this case is resolved. Counsel for Employer is the focus of Claimant’s rage and that is why Dr. Ginzburg uses his name too. It is the way Claimant perceives his problems. Once this case is settled, Dr. Ginzburg thinks Claimant’s outburst should decrease in both frequency and intensity. The only way to continue Claimant’s therapy in a positive manner is to find another therapist to focus solely on his anger management.¹⁹²

The last time Claimant was in Dr. Ginzburg’s office, at first everything was fine, but then all of a sudden Claimant was screaming and cursing about his case. Dr. Ginzburg told him to calm down and they took 30 seconds to regroup. Claimant can be threatening. “He’s soft, but he’s large.” At one level, he fixates on the stressors involved with this litigation. They trigger his anger problems and are a big part of his problem. At the second level, Claimant used to perceive himself with the ability to earn a decent living and now believes he will never have that opportunity again. Claimant does not believe he could return to earn the same hourly wage he earned before he was terminated from Employer.¹⁹³

Based on his treatment of Claimant and various observations, Dr. Ginzburg “would be concerned about [Claimant] working with others at this point in time [May 2005].” This is not based on Claimant’s engineering skills. It is based on the fact that if Claimant lost his temper in a work environment, it could very easily turn confrontational and violent and someone could get hurt. Dr. Ginzburg could not state when Claimant could return to some form of work, but to ask him again in two or three months. Dr. Ginzburg just found a medication which seems to help Claimant, but he has not started anger management therapy yet. His first appointment was set for after the formal hearing. The length of necessary treatment varies widely. Treatment could take anywhere from a couple of months up to ten years. The problem with Claimant is that if he is injured, rehabilitated, and then put back to the same or similar job, if he cannot do the work, he will become angry and embittered. He may feel deprived of what he had been doing up until his injuries. Claimant can receive supportive therapy and encouragement therapy, but his injuries changed the quality of his life.¹⁹⁴

If Claimant got a job which paid him close to what he earned prior to his injuries, he would do much better than if he took a job similar to the one he held for a brief period at the sugar mill after his injuries. Claimant admitted that he left the job at the sugar mill because had he stayed, he would have gotten into a physical altercation with the employer because he felt the Hispanic workers were being abused and he identified with them. He called Dr. Ginzburg from the job site and Dr. Ginzburg “told him to essentially walk off and come to see [him].” Dr. Ginzburg believes and Claimant agrees that once he is able to do some form of work, it would be beneficial for him psychiatrically to work rather than remain unemployed.¹⁹⁵

¹⁹² CX-3, pp. 23-27.

¹⁹³ CX-3, pp. 27-29.

¹⁹⁴ CX-3, pp. 29-33.

¹⁹⁵ CX-3, pp. 33-35.

He is sure that he at least tried to treat Claimant's anger management with Tegretol. Dr. Ginzburg does not like Tegretol, since the FDA noted its potential lethal effects. Dr. Ginzburg had a disagreement with Dr. Greve regarding the advisability of using Tegretol with Claimant. Dr. Ginzburg had Claimant on anti-seizure medication, Topamax and Dilantin, but Dr. Greve insisted that he use Tegretol and was "frankly ill-mannered." Dr. Greve wrote a letter to the insurance company without sending a copy to Dr. Ginzburg regarding research he did on Tegretol. The Carrier later sent a copy of that letter to Dr. Ginzburg. Dr. Ginzburg asked Dr. Greve for a copy of his research because if he could show the cost or risk benefit theory that Tegretol was reasonable to use, Dr. Ginzburg would have prescribed it to Claimant. Dr. Greve never responded to his request and never provided the literature. Dr. Ginzburg did his own review of the literature and could only find one paper where Dr. Greve was not directly involved in the research. From what Dr. Ginzburg saw, Dr. Greve misrepresented what he was saying. In addition, at that point in time, Dr. Greve was not licensed to prescribe medication. Dr. Ginzburg questioned why Dr. Greve would want him to take an undo risk with a patient. Dr. Ginzburg is a little more cautious than someone who has "never been in an engine room." There is no literature that suggests Tegretol was any better or safer than other medications and he prefers medications that are not particularly harmful. Tegretol is one of the medications he stays away from. Regardless, using anti-seizure medication did not help resolve Claimant's problems.¹⁹⁶

There are other medications available, such as Depakote and Gabitril. Dr. Ginzburg tried putting Claimant on these medications, but they did not provide relief either. He currently has Claimant on Doxepin and Effexor. These seem to help Claimant and are better than using "an atypical anti-seizure medication." Treatment with Doxepin and Effexor is not a new approach to dealing with anger management in the field of neuropsychiatry. Anger directed "inward is depression, directed outward is hostility and directed sideways is psychosis." However, based on Claimant's recent behavior he still has outbursts. There are no lab tests to check whether he is taking his medications.¹⁹⁷

Claimant's perceived fear that he has been black listed is one thing that keeps him from going back to work for a different employer. Dr. Ginzburg is also concerned that Claimant would not be able to function with others in the workplace without causing physical tumult. It is Dr. Ginzburg's goal to get Claimant a job where he could start part-time (work four hours per day or every other day). It is Dr. Ginzburg's professional opinion that it could take somewhere between six months and six years of additional therapy to get Claimant back to a point of employment. He just has no sense of what it would take the new therapist to help Claimant. He cannot say how long it will take, just that it will take awhile because first Claimant has to engage in therapy and then it takes time to reach a successful, acceptable position.¹⁹⁸

¹⁹⁶ CX-3, pp. 35-36, 65-67, 83.

¹⁹⁷ CX-3, pp. 36-37, 67-69.

¹⁹⁸ CX-3, pp. 37-39.

Although it has been 33 months since Claimant's last injury, his condition has gotten worse. Claimant will not buy his medication because he does not want to pay for it and the insurance company will not pay either. Dr. Ginzburg even told Claimant to get the medication, bring back the pharmacy bill, and Dr. Ginzburg would reimburse him out of his own pocket. Dr. Ginzburg had no problems doing this because he believed he would later be reimbursed. Claimant needs the medication. Claimant is concerned about getting the people providing him services paid promptly. Dr. Ginzburg even told Claimant to go to the new therapist, to pay her, to bring Dr. Ginzburg back the bill and he would write Claimant a check. Dr. Ginzburg would wait for the reimbursement himself.¹⁹⁹

He recommends psychotherapy treatment every three or four weeks. It is a way of managing Claimant's medication and dealing with issues surrounding the litigation. Dr. Ginzburg wants the anger management therapist to only deal with the anger issues and would rather they not know about the litigation. This will help the therapist keep Claimant on track. The new therapist that Dr. Ginzburg referred Claimant to is not someone he has worked with before. He asked her to do an evaluation and they would discuss it afterwards. He assumes that she would want to see Claimant every week at the beginning and would then taper off the visits as necessary. He could not testify for her directly.²⁰⁰

Dr. Ginzburg first saw Claimant in October 2002. Claimant reported five separate head traumas, but stated that it was not until the last two head injuries that he started "not catching" what he should. He was referring to his head injuries on 02 Mar 01 and 16 Sep 02. Based on his evaluation and the history Claimant provided, he diagnosed Claimant with postconcussional disorder with a reported change in personality and alterations in behavior, adjustment disorder with mixed disturbance of emotions and conduct, occupational problem, occlusion of vertebral artery (documented radiographically) probably from a closed head injury, history of cardiac symptoms, status post multiple concussions, and hypothyroidism as determined by an elevated TSH test result.²⁰¹

Claimant returned for a follow up on 19 Nov 02. Claimant had not returned to work. He reviewed Claimant's medical progress and laboratory data. Claimant appeared calmer and there did not appear to be any abnormalities in an assessment of cranial nerves. Claimant relayed that he feels that he was sent to anger management for unjust circumstances. He expressed frustration at work. Claimant wants to work and get off his restrictions. Dr. Ginzburg reported obvious problems between Claimant and his immediate supervisor. Claimant felt capable of returning to work, but he did not want to go back and get hurt and then be told that it was his fault because he volunteered.²⁰²

¹⁹⁹ CX-3, pp. 39-41.

²⁰⁰ CX-3, pp. 41-42.

²⁰¹ CX-2, pp. 1-10.

²⁰² CX-2, pp. 11-12.

On 06 Dec 02, Claimant returned and informed him that his benefits decreased because he has been found fit for duty by an adjuster. Dr. Ginzburg was never asked if Claimant was safe to return to work. Although the cardiac evaluation was favorable, Claimant still had neuropsychological issues to be addressed before being released to return to work. Dr. Ginzburg opined that Claimant was temporarily totally disabled, at least pending a medical evaluation. The objective findings require that Claimant undergo a neuropsychological study before he could be released to work. Claimant also reported visual changes. Claimant denied becoming physical during his outbursts, just that he gets verbal. His diagnosis pretty much remained the same.²⁰³

Claimant returned on 15 Jan 03. His neuropsychological evaluation was consistent with multiple concussions and a low threshold for stress. Claimant described feeling more relaxed and they discussed treatment options. Dr. Ginzburg prescribed Paxil and told Claimant to return after his neurological consultation. On 17 Jan 03, Dr. Ginzburg was informed that Dr. Freiberg released Claimant to return to work with his weight restrictions remaining in effect for three months. Dr. Freiberg was advised that Dr. Greve indicated that Claimant could return to work, but it is unclear if Dr. Freiberg knew that a series of anger management sessions were recommended by Dr. Greve or that Dr. Ginzburg had not released Claimant to return to work yet.²⁰⁴

On 17 Mar 03, Claimant returned to Dr. Ginzburg and reported that his benefits were cut off and Dr. Greve refused to give him a copy of his records. Claimant appeared to have a better handle on his anger with Paxil. Their session focused on the problems created for Claimant by Drs. Greve and Bushman. Claimant was concerned about what they had written and why they refused to provide him copies of their reports. Claimant still was not cleared to return to unrestricted work, from a medical not a mental health perspective. Dr. Ginzburg increased the Paxil.²⁰⁵

Claimant returned on 03 Jun 03 after returning to work and being laid off because of company downsizing. He returned to work only because Dr. Freiberg released him. No one contacted Dr. Ginzburg to discuss whether he would release Claimant to return to work. Dr. Greve is a clinical neuropsychologist who is not licensed to prescribe medication, yet his reports discuss his recommended medication even though he fails to cite his research for relying on those medications. Dr. Ginzburg opined that Dr. Greve's conclusions seem to ignore medical and historical data including Claimant's cardiac and trauma history. Claimant informed Dr. Ginzburg that his ex-wife laughed when he told her he was referred to anger management therapy because of his previous history of being calm and peaceful. As of this examination, Claimant was doing well and needed continued supportive and insight psychotherapy and medication. The 03 Apr 03 MRA report reflected that "the blood vessel remained blocked or occluded not allowing blood

²⁰³ CX-2, pp. 13-15.

²⁰⁴ CX-2, pp. 15-17.

²⁰⁵ CX-2, pp. 18-19.

flow through it and casually, it appears, the etiology is secondary to his head trauma.” On 17 Jun 03, Claimant described lapses of concentration rather than visual field defects. At that time, Claimant was not a danger to himself, others, or property. He did not have psychotic thought processes, paranoid ideations, loose associations, or tangential thinking.²⁰⁶

On one occasion, Claimant’s grandfather pulled a gun on him. He pointed it at Claimant said he was going to shoot him. Claimant called 911 twice. The grandfather was arrested and then filed assault charges against Claimant. Claimant used good judgment calling the police and filing a restraining order. Claimant is trying to nurture his stepson. He also wants to return to work, but he was laid off after he was released to light duty work. He has been looking for work.²⁰⁷

Claimant did not return until 09 Mar 04, requesting an emergency appointment. He lost his temper during his deposition. He had to be physically restrained and felt remorseful afterwards. Claimant reported he felt badgered by the attorney. He explained that his temper has been a problem since his head injuries. The rages drain him physically. Claimant has also continued to gain weight. Claimant was depressed and anxious, but appeared coherent and is not a danger to himself, others, or property. He returned on 25 Mar 04 for a medication check. Dr. Ginzburg increased the dosage of the Topamax. Claimant continued to be off work and is angry that Employer will not pay for his medication. Claimant is frustrated and feels that Employer is not meeting its responsibility. Claimant expressed a desire to select his own doctors. Claimant reported that he feels poorly treated by Dr. Greve. He reported the onset of headaches in the left temporal area characterized as dull pain. One time it was real sharp – it felt like a nail went through his foot. His diagnosis remained the same. Claimant continued to have significant neuropsychiatric dysfunction from his work related injuries documented radiographically. Anger management therapy has been successful, but medication management has been difficult. “To a medical degree of certainty . . . [Claimant] has developed significant neuro-psycho-pathology secondary to cranial trauma with resultant dysfunctional changes in behavior and affect.” Claimant is responsive to psychotherapy; however, it will be a slow and prolonged process.²⁰⁸

Dr. Ginzburg opined that the more times a person is struck in the head, the more likely they sustained injuries, if not structural problems. More likely than not, there would be an aggravation of a pre-existing condition. His opinion that Claimant aggravated his condition is not based on the symptoms themselves, but on the fact that the more head trauma one has, the worse off they usually are. He cannot quantify how Claimant “blows up” more now than before because he did not see him until October 2002. He has personally seen Claimant blow up though and has also spoken to Dr. Freiberg about the incident in his office. He also spoke to the police after the incident at Dr. Freiberg’s office and the police brought Claimant to his office.²⁰⁹

²⁰⁶ CX-2, pp. 20-23.

²⁰⁷ CX-2, pp. 24-25.

²⁰⁸ CX-2, pp. 26-30.

²⁰⁹ CX-3, pp. 42-47, 51-52.

If Claimant hit his head again on 16 Sep 02 and aggravated a pre-existing condition, then he would not be materially and substantially more disabled because of his pre-existing condition than he would have been if he only bumped his head on 16 Sep 02. Usually you can control the work environment, because things like “hatch size” do not change day to day, but for Claimant he worked on different vessels, with different temperature, different people, different working conditions, and different problems. This just adds to the frustration factor. It is a slow build up. Claimant started becoming more aware of symptoms he had begun to ignore. Dr. Ginzburg knew Claimant threw a chair at Dr. Freiberg and broke a window. Claimant also threw telephones and had problems with dizziness. All of his symptoms combined interfered with his ability to perform. He had a cumulative effect - physiologic, pathophysiologic, psychological, and pathopsychological. The 16 Sep 02 injury was the “straw that broke the camel’s back.”²¹⁰

Headaches are a generic symptom and Dr. Ginzburg did not know whether it was migraine or cervical musculoskeletal. Sometimes when a person bangs his head, the neck muscles go into spasms. Dizziness and palpitations were two reasons he referred Claimant to Dr. Snyder initially. When Dr. Ginzburg first saw Claimant, he “sounded more cardiovascular than it did neurologic[al] . . .” Somewhere along the line, Claimant was prescribed Digoxin. Dr. Ginzburg thought he saw a bit of hyperthyroidism, which can cause palpitations and irritations, so he sent Claimant to a cardiologist. Dr. Snyder conducted various tests and ruled out cardiovascular disease. Claimant was taken off the Digitalis and all of his symptoms continued.²¹¹

The PET scan from 08 Jun 04 also read as abnormal. Since there are three neurologists involved in Claimant’s case, Dr. Ginzburg would want to know what they said before he deferred to them. Generally, he takes a report at face value and looks to see if there is clinical correlation. Claimant has clinical correlation; therefore, Dr. Ginzburg has no reason to challenge the neuro-radiologist, Dr. Martinez. He has set up anger management therapy for Claimant with Ms. Mong, a therapist. Dr. Ginzburg would continue to prescribe Claimant medication. Until Claimant is set with a therapist, there is no sense switching his psychiatrist “because if it falls apart, then there’s no safety net for him.” Claimant has to find a set of therapeutic interventions to get him back to earning a livelihood at a level that approximates where he was in the past.²¹²

He would not disagree with psychologists’ reports that suggest Claimant has an impulsive aggressive personality. It is just another way to characterize what he sees with Claimant. The best person to know Claimant’s behavior problems is his ex-wife. If what Claimant, Claimant’s father, and his mother have told Dr. Ginzburg is true, then Claimant did not have this kind of behavior before he started having head injuries. If not, any personality changes have an organic component. If Claimant has had an impulsive aggressive personality, but was able to cope and maintain his rage until the series of head

²¹⁰ CX-3, pp. 51-57.

²¹¹ CX-3, pp. 47-49.

²¹² CX-3, pp. 58-65.

traumas, then Dr. Ginzburg did not know which head injury “either stopped up the relief valve on the pressure cooker, so now instead of it just whistling like a teapot, it blows up, or caused his problems in the first place.” Before his head injuries, Claimant was functional and under control regardless of his pre-existing pathology. Whether his injuries are causing a new illness or aggravating a pre-existing illness, it leads to the same point that Claimant is now dysfunctional. Dr. Ginzburg reported on 27 Aug 04, that before determining whether Claimant could return to work, he wanted a working set of differential diagnoses. He first wanted to determine when Claimant would reach maximum medical improvement. Then he would determine whether Claimant could tolerate the work.²¹³

Claimant returned to Dr. Ginzburg on 11 Oct 04 and 16 Nov 04 after calling panic stricken to discuss his new job. He had an incident while working at the sugar mill. He was concerned with how management dealt with workers that were operating heavy equipment. He wanted to continue working in that capacity, but described potential safety hazards with his new employer. He got into a confrontation, but left before it escalated into something physical. There was no clinical evidence of psychosis, loose associations, or tangential or concrete thinking. There continued to be some data driven paranoia, especially regarding this litigation. Claimant’s temper remains a concern, especially in the work place. Claimant’s status remained the same. Despite some conflicts, Claimant appeared able to maintain his current employment at the sugar mill. He also lost about 20 pounds. Claimant felt good as of that examination. He recognizes his problem and tries to regain control. He loses track of time when he gets angry and work becomes difficult. Claimant was emotionally volatile and cried during their appointment. He started Claimant on Trileptal and tapered the Dilantin. He called on 22 Nov 04 and informed Dr. Ginzburg that he was tolerating the new medication.²¹⁴

Claimant returned on 02 Feb 05 following another blow-up. He threw a chair at a ceiling fan, kicked a bucket, and slipped on the wet floor. He had an umbilical hernia repaired several weeks prior. He became angry after receiving a bill from Tulane University Medical Center because Employer did not pay the bill. Employer’s continued denial of payment for his medical treatment has significantly aggravated Claimant’s condition. He feels that Employer is personally out to cause him harm. Dr. Ginzburg reported that unfortunately the behavior of Employer’s lawyers toward Dr. Ginzburg has also been overtly hostile. It appears that the lawyers are trying to deliberately provoke Claimant and then using the fact that he has a problem controlling his temper as a basis for stating that Claimant is not cooperating with the judicial process. However, Claimant’s problem with his temper is only secondary to his work related injuries. Much of their treatment sessions involve Claimant venting his frustrations. Claimant’s temper remains a concern, especially in the work place. Claimant reported concerns about his future and began to cry. Claimant’s father called Dr. Ginzburg on 08 Feb 05 with concerns because Claimant got angry and threw his phone, breaking it. Claimant’s father had not been able to reach Claimant since.²¹⁵

²¹³ CX-3, pp. 69-71; CX-2, pp. 42-43.

²¹⁴ CX-2, p. 47.

²¹⁵ CX-2, pp. 49-51.

On 09 Mar 05, Claimant returned for a follow up. He has broken several phones out of anger. He feels humiliated. He expressed worry at blowing up at the Court during his formal hearing. Because of his frustration he started smoking a lot of cigarettes. He reported intolerance to his new medication, Seroquel. It made him lethargic and non-functional. In addition, an increased dose of Trileptal has not controlled his temper outbursts. They discussed how Claimant can avoid confrontations and that he should withdraw when they occur. Claimant returned on 24 Mar 05 after becoming angry and smashing his foot with his keyboard. As usual, he was contrite and frustrated with his behavior. He has not been able to find employment and began crying when asked about going over to the state unemployment office. Although Claimant is not a danger to himself or others, he can incidentally hurt himself during one of his outbursts. Claimant wants to get on with his life.²¹⁶

Claimant returned on 18 Apr 05 after being before the magistrate. He was ordered to give another deposition. The lawyers did not want to meet face to face with him because they are scared of him. Dr. Ginzburg does not understand how the attorneys on one hand can be scared to meet with Claimant, but on the other feel it is okay for him to return to work. This was the most upset that Dr. Ginzburg had seen Claimant. His voice was raised, but he was not threatening. Claimant just wants to know what is going on. He continues to have difficulty sleeping at night because of emotional strain. The medication did not stop Claimant's rage reactions.²¹⁷

On 13 May 05, Claimant returned and complained of a series of confrontations with his attorneys. He was agitated and concerned about the proposed settlement. He was screaming, but was not physically threatening. He is frustrated and easily aggravated. Claimant stopped taking his medication because he needs to go to Court to get his medication. Claimant cannot afford his medication. Dr. Ginzburg called the pharmacy and gave Claimant money to purchase the medication.²¹⁸

Claimant came in with his stepson on 29 Jun 05. His stepson indicated that Claimant has become more explosive over time and particularly in the last six (6) months. Any little thing sets him off. Claimant becomes easily agitated with how Employer treats him. Claimant came in with his parents on 14 Jul 05. His parents reported noticing personality differences with Claimant. Claimant has become reclusive and is banned from Home Depot. On 18 Jul 05, Dr. Ginzburg opined that Claimant was permanently totally disabled because of his inability to control his temper outbursts which appear to have an organic component secondary to multiple instances of head trauma.²¹⁹

²¹⁶ CX-2, pp. 52-53.

²¹⁷ CX-2, pp. 54-57.

²¹⁸ CX-2, p. 58.

²¹⁹ CX-2, pp. 63-69.

Claimant has not had a decrease in intelligence and Dr. Ginzburg does not want to use “cognitive” to describe Claimant’s impairments. The issue is Claimant’s ability to process information because of anger thoughts. He tries to talk with Claimant about things and then all of a sudden Claimant is standing up screaming and cursing. Claimant cannot relay why he gets angry and it happens without “trigger” questions. Dr. Ginzburg has reviewed the sentences in his head and there would be nothing that could be misconstrued. It is a processing problem. Claimant focuses on his anger and loses track of his environment. This makes him a “safety hazard in the workplace, independent of precipitating somebody to physically assault him . . .” It could also get him into trouble driving.²²⁰

The 16 Sep 02 head injury was the last straw in the sense that the injuries were cumulative and he stopped working after the last one. He could not state what injuries Claimant had after each accident and how his impairment changed. It is a summation problem. At some point, he reached “critical mass” and by the time Dr. Ginzburg saw Claimant, he was out of control. Dr. Greve reports that on continuous performance tests, the data indicates that the probability that Claimant has a clinically significant sustained attention problem is 99.9 percent. Claimant “is distractible, despite grossly intact focused attention span, resistance to interference. He may have some difficulty with mental manipulation.” His clinical observations are exactly aligned with what Dr. Greve found in his December 2002 evaluation. Dr. Ginzburg has a problem with Claimant operating machinery.²²¹

Dr. Ginzburg did not think he demonized the attorneys in this litigation and he did not think it would be beneficial for Claimant if he had. He would not use the word demonize, but he certainly disagreed with Employer’s attorney in the deposition he sat in on. Dr. Ginzburg advised Employer’s attorney prior to the deposition how to handle Claimant – to ask short questions and not to repeat questions – but the attorney proceeded to cover material already discussed in three prior depositions and then threatened Claimant that his case would be dismissed if he was uncooperative. Claimant has had several depositions. He had difficulty controlling his temper during the depositions. Dr. Ginzburg did not believe Claimant would hurt anyone. He relayed to Dr. Ginzburg that counsel kept badgering him and asking him the same questions. He has not reviewed the other depositions to see if it was an accurate statement. He denies issuing any “warning” to Claimant about counsel for Employer. He has not told Claimant that counsel is after him or for him to harm anyone. Claimant’s anger is not raised to a point where he thinks counsel is in danger of bodily harm. Dr. Ginzburg tries to deal with Claimant’s reality. He tries to crawl into his head to know who may or may not be in danger. He has not told Claimant that counsel personally interfered with or withheld his medical treatment. Claimant is angry with Mr. Huntley because he had a personal relationship with him before all this began.²²²

²²⁰ CX-3, pp. 71-75.

²²¹ CX-3, pp. 75-77, 80-83.

²²² CX-3, pp. 84-92; CX-2, p. 45.

Over the two years of treatment, his diagnosis changed. Dr. Ginzburg became comfortable that it was a neurological disorder, not cardiac. Claimant continues to suffer from post-concussive disorder. The diagnosis has become more formalized since he now has a complete history and a copy of the MRI and MRA, which he did not have initially.²²³

Claimant was on Topamax when the outburst at Dr. Freiberg's office occurred. He only stops the medication about two (2) weeks before the PET scan. The incident occurred on 20 Apr 04 and the test was not until 08 Jun 04. He switched Claimant to Dilantin on that day. There is no blood test to determine what level of Topamax he had during that period. There are two tests to determine the levels of Dilantin. Claimant was brought to Dr. Ginzburg's office in handcuffs after he turned violent on Dr. Freiberg and smashed a window. When he arrived he was calm and contrite and remained so for the next two hours. Given his outburst, Dr. Ginzburg tapered off the Topamax and started the Dilantin. Claimant understands he needs to avoid violence and walk away from potentially inflammatory circumstances. Claimant's diagnosis remained essentially the same, with the addition of "personality change due to a general medical condition – aggressive behavior – explosive in nature. Rule out temporal lobe/basal ganglia epilepsy."²²⁴

A negative EEG does not rule out a seizure disorder. The deeper the seizure disorder, the much harder it is to pick up. "Unfortunately, it was a sleepy EEG rather than a 24-hour EEG." He wanted Claimant to carry a 24-hour EEG to monitor his stress and chest pain. This would help him determine the changes in Claimant. Keeping Claimant in a sleep lab was a waste of \$2,000. He understood that Dr. Wakeman recommended the sleep lab.²²⁵

Around 20 Jun 06, Claimant went to the Summit emergency room with a mixture of cardiac symptoms and "just not feeling well." Claimant left Dr. Ginzburg a message that sounded as if he was thinking about killing himself. When Dr. Ginzburg spoke with the emergency room doctor, they were going to put Claimant on a 72-hour hold, but then Dr. Ginzburg spoke with Claimant's father and found out that Claimant had to "sign the papers" the next day. Everybody agreed that it was sufficient for his parents to watch over him. Claimant called Dr. Ginzburg everyday. Claimant did not always recall speaking with Dr. Ginzburg. He has not seen any substantive improvement.²²⁶

Dr. Brobson Lutz.²²⁷

Claimant presented in his office on 16 Dec 02 for an evaluation of his thyroid status. Examination revealed an obese male with slightly flat affect and no abnormal thyroid masses. He tested Claimant for other possible causes of cognitive problems,

²²³ CX-3, pp. 93-94.

²²⁴ CX-3, pp. 94-97; CX-2, pp. 31-35.

²²⁵ CX-3, pp. 97-99.

²²⁶ CX-3, pp. 49-51.

²²⁷ CX-4.

including chronic viral diseases and drug abuse. All of the additional studies were negative. Dr. Lutz opined that Claimant did not have a clinically apparent thyroid dysfunction (past or present) and needed no treatment at that time. However, he recommended that Claimant obtain a TSH level once or twice yearly. If the value rises above 15, then Claimant should consider supplementation with Synthroid.²²⁸

Dr. Diana Barrett:²²⁹

She first saw Claimant at the Family Physicians' Center on 27 Apr 04 for complaints of anger outbursts, vision problems, and "artery." He informed Dr. Barrett that he occasionally felt lightheaded when he works with his head or neck or in an uncomfortable position. Otherwise, he had no real neck pain. He informed Dr. Barrett that he was calm before his accidents. He reported that his outbursts began in mid-2000. He also had more than five (5) incidents of passing out from his heart racing and his heart medication. Claimant has not performed any heavy work in more than two (2) years. She performed a neurological examination. Claimant also reported problems seeing things that are directly in front of him. He already saw an ophthalmologist and was advised that everything was ok. Dr. Barrett wanted to wait and see how Claimant reacted to the Dilantin. She recommended that Claimant not drive, regardless of Dr. Dawson's opinion that he could. She ordered additional testing.²³⁰

Claimant returned on 06 Jul 04 with the same complaints of anger problems. He denied hallucinations. He continued to take Dilantin and receive anger management counseling. Review of the PET scan revealed diminished metabolic activity in the temporal and "ponetal" cortexes compared to frontal and occipital.²³¹

Dr. Richard John Wakeman:²³²

He is a clinical neuropsychologist. He evaluates and treats patients with changes in their brain functioning, either through medical illness, organic pathology, trauma, toxic exposure, or personality disorder problems. He is board-certified in clinical psychology. He is not board certified in neuropsychology because when he became certified in 1981, there was no Board for neuropsychology and he never took the separate board even after it was established. He is not a member of the American Board of Neuropsychologists and has never heard of them. He is familiar with the American Academy of Clinical Neuropsychology, but is not certified with them either. He has never participated in studies related to temper or anger management problems, but has treated patients with those problems. He has never published papers or articles related to the treatment or diagnosis of anger problems. He has published an article on behavioral medicine in which anger management patients were included in an overall study. It went through the peer review process. While he worked at Ochsner, a large percentage of his practice

²²⁸ CX-4, p. 1.

²²⁹ CX-5.

²³⁰ CX-5, pp. 1-8.

²³¹ CX-5, pp. 9-14.

²³² CX-6; CX-7; EX-10; EX-26.

included treating patients with anger problems. He was the director of the Behavioral Medicine Unit. Some of the anger management treatment was related directly to head trauma patients. About 50 percent of his patients are involved in litigation. Of that 50 percent, about 60 percent are referred by their attorneys and the other 40 percent are referred by their physicians. The majority of the attorneys that refer him patients are defense attorneys.²³³

He saw Claimant on 05 and 10 Aug 04 for an independent neuropsychological evaluation. He was referred by Dr. Ginzburg and Claimant's attorney. He reviewed all of Claimant's medical records and conducted about 30 various tests to determine Claimant's impairments. He did not review any diagnostic films or related reports. He also obtained a detailed background from Claimant, including all of Claimant's prior head injuries. Claimant denied any mental illness or prior psychiatric hospitalization. He did see a counselor with his former wife for approximately three or four visits. Other than after his September 2002 accident, Claimant either just kept working or returned to work after each injury. However, Claimant lost consciousness for about 15 minutes after the September 2002 accident. He was taken to River Parishes Hospital after the March 2001 and September 2002 accidents. It took three (3) hours to get him to the hospital after the 2002 accident because the workers continued working.²³⁴

Claimant informed Dr. Wakeman that he has continuing problems since his latest head injury in September 2002, including occasional headaches and cognitive complaints, such as, significant inattention to most details, being easily distractible, and not seeing things right in front of him. He takes over the counter medication for his headaches. He also related problems with temper outbursts and explosive behavior. He denied having temper problems prior to his earlier head injuries. He also denied having memory problems. His complaints of loss of vision are more likely a lack of concentration and inattention to detail with the highest degree of distractibility. His primary complaint was headaches. Claimant's wife corroborates Claimant's complaints. Prior to his head injuries, Claimant was short-tempered and somewhat irritable, but he became significantly worse after his injuries. She has noticed subtle personality changes such as less patience, more irritable, frequently depressed, socially withdrawn, and isolative. Claimant no longer laughs and she fears that he is unable to voluntarily control his temper. She denied that this was a problem before his first head injury. Claimant acknowledged impulsiveness, low frustration tolerance, depression, change in appetite, and decreased energy. He gained 100 pounds in the past two years since he stopped working.²³⁵

Claimant believes he has blackouts during his violent behavior episodes and is occasionally dizzy during that time. There is no direct evidence of a seizure disorder. There is evidence that he has mild insight and impaired self-awareness of his overall personality changes. He acknowledges impulsiveness, temper outbursts, and significant frustration with low frustration tolerance. He described a euthymic mood (normal state)

²³³ CX-7, pp. 5-10, 35, 51.

²³⁴ CX-6, pp. 2-4; CX-7, pp. 8-9, 11-13, 51, 65-66.

²³⁵ CX-6, p. 3; CX-7, pp. 39-41, 66.

prior to his head injuries, but now admits to having a dysphoric mood with symptoms of anhedonia, appetite change, decreased energy, social isolation, and reclusiveness. He denied any anxiety or worry.²³⁶

Dr. Wakeman performed a physical examination. Claimant was highly cooperative. Although Claimant reported depression, he did not appear depressed during the two days of his evaluation. There were no significant decreases in Claimant's overall intellectual efficiency. To a certain extent, a diminished capacity could also be due to depression. Claimant's overall general memory was solidly average with no significant deficits. Since there was a discrepancy with Claimant's working memory performance which were significantly lower than all other functions, Dr. Wakeman administered additional tests to better define Claimant's abilities. However, it is a bit of speculation to determine what type of working memory and processing speed he had before his head injuries compared to his present condition. Claimant showed difficulties with preservative impulsivity. The overall results are clinically significant for attention deficit difficulties with impaired concentration and attention functioning. His level of immediate recall was well below average from people with no brain trauma. Claimant scored at the 18th percentile. While on the standard form anything over 16 percent is average, the short form has significantly fewer items and is primarily used for an immediate attention test as opposed to a full memory test. He uses the short form to corroborate the Conner's Continuous Performance Test. He used the short form because he was only looking for attention difficulties and malingering. Claimant was already given a better memory test, the Wechsler Memory Scale III, so he saw no need to perform a lesser exam by having him also do a long form test. The short form test is a better assessor of whether a patient is malingering. His immediate learning was below average on three (3) or four (4) trials. Upon testing Claimant's cognitive function, Dr. Wakeman noted that Claimant's overall performance with non-verbal mediated abstract reasoning was significantly lower than his prior tests done by Dr. Greve. Dr. Wakeman could not give a reason for this drop. Regardless, the results suggests mild to moderate impairment of higher order concept formation and problem solving ability in more visual spatial tasks than verbally mediated tasks.²³⁷

Claimant also had mild to borderline impairment of his visual spatial perceptual ability. Although his non-dominant left hand performance was slower than the right, it was still in the average range, even though the difference exceeded the differential expected. Claimant had so much peripheral (fingers, wrists, arm injuries) injury bilaterally to his hands that it is difficult to say whether it was a result of a peripheral injury prior to his head injuries or related to his head injuries. Despite a number of cuts to his left hand, Claimant denied any significant injury. When his hands were injured bilaterally in a work accident, the majority of the injury was to his right hand. Neither hand sustained tendon, muscle, or ligament damage. Dr. Wakeman concluded that Claimant had no problems with his visual, spatial, and constructional functions.²³⁸

²³⁶ CX-6, pp. 3-4.

²³⁷ CX-6, pp. 4-8; CX-7, pp. 14-19, 58-60.

²³⁸ CX-6, pp. 8-9; CX-7, pp. 18-19.

Tests for exaggeration or malingering were negative. However, Claimant's MMPI results were invalid because he failed to answer 36 or more questions. He could not explain why Claimant did not complete the MMPI. Dr. Wakeman agreed with Dr. Greve's statement that Claimant's MMPI results indicated that he had a compulsive/impulsive personality disorder. Examination of the clinical items suggested depressed suicidal ideation, threatened assault, mental confusion, and persecutory ideas. His BAI score suggested minimal anxiety and his BDI score suggested mild depression. The results of the tests were consistent with Claimant's euthymia²³⁹ during the evaluation and not with Mrs. Munson's report of continued depression. Every test Dr. Wakeman formally gave to Claimant was negative for malingering. The tests indicated optimal performance motivation, indicating no attempt to exaggerate his impairments.²⁴⁰

As of 05 Aug 04, Claimant's current neuropsychological test results were consistent with significant concentration and attention deficits typically seen in individuals with traumatic brain injuries. A mild traumatic brain injury encompasses things such as a concussion and head trauma where a patient does not lose consciousness for over 30 minutes or has amnesia for more than 24 hours after the accident. Concussions are also categorized as to degree of loss of consciousness, even in traumatic brain injuries. The only difference between mild and severe traumatic brain injuries is the degree of time a person is unconscious. However, a patient does not have to be unconscious to suffer a traumatic brain injury. Claimant's reports indicate he suffered from mild traumatic brain injuries. His overall tests suggest right hemisphere involvement, specifically related to his upper motor neuron functioning and visual spatial perception results. Given Claimant's history of right vertebral artery dissection, his right cerebral hemisphere performance deficits may be correlated, but require neurological confirmation. As a matter of normal anatomy each person has two vertebral arteries. A person can survive with only one, however two is preferable. When there is only one vertebral artery and it gets damaged, "then the feed-off arteries are affected because there's less blood flow and the end points of those feed-off arteries can be damaged." If a person lost total functioning of the remaining vertebral artery they would die.²⁴¹

According to Claimant and his wife, his personality functioning has changed dramatically. This is consistent with Post Concussive Syndrome, which is typically seen by people who have sustained mild head injuries. Claimant's degree of attention and concentration impairment is so significant that this will play a significant role in future occupational endeavors and training pursuits. "Mild mental inflexibility and higher order abstract reasoning inefficiency (logical reasoning) will be an additional factor in future occupational choice." He recommended 24 hour EEG monitoring to determine whether Claimant's temper outbursts were actually seizure related. During his IME, Claimant's frustration tolerance seemed more than adequate. He was observed managing his acknowledgement of failure on difficult tasks without significant frustration. He did not show any temper or ease of temper or frustration during some highly frustrating testing moments. His frustration tolerance was better than Dr. Wakeman would have expected

²³⁹ Mood in the "normal" range, which implies the absence of depressed or elevated mood.

²⁴⁰ CX-6, p. 9; CX-7, p. 20, 56-57, 66.

²⁴¹ CX-7, pp. 21-26, 64-65.

given his history. Dr. Wakeman could not explain the discrepancy of how Claimant seemed to be more patient than the doctor expected. The overall neuropsychological test results and personality changes, including temper outbursts, are consistent with deficits incurred from a mild traumatic brain injury.

It is with the highest degree of certainty that his attention and concentration difficulties and personality changes (temper outbursts) are head injury related as there is no evidence that such behavioral deficits were preexisting. It is more probable than not that his right vertebral artery dissection/occlusion is a result of multiple head traumas and could pose serious neurological risks in the future.

Claimant had no other possible causes for his change in behavior. If there was evidence of pre-existing attention and concentration difficulties or temper outbursts it would change the degree of impact of the head injuries. If these problems existed prior to a head injury, then it would be an increase in an already existing problem. However, nothing presented to Dr. Wakeman suggested that Claimant had any pre-existing problems.²⁴²

A relation to seizures would make his anger outbursts fall into the category of uncontrollable temper outbursts, but there is no evidence of seizure activity with Claimant. However, a normal EEG would not change his opinion because he never thought Claimant's anger was seizure related. "Neurobehavioral Consequences of Mild Traumatic Brain Injury" by Harvey Levin links personality changes with mild head injuries. Dr. Levin is considered the expert in the field of mild traumatic brain injury. It is Dr. Wakeman's understanding of the medical literature that personality changes, including temper outbursts, are consistent with deficits incurred from mild traumatic brain injuries. He relies on the truthfulness and accuracy from his patients and others interviewed to determine what type of problems they had before and after their injuries. That is why he also interviewed Claimant's wife.²⁴³

There are many other potential causes for right vertebral artery dissection/occlusion, including a cardiac embolism. Without neurological confirmation he cannot state what role, if any this dissection or occluded vertebral artery played in Claimant's current symptoms. There was no other imaging data or neurological testing data showing Claimant had any brain damage other than the occluded vertebral artery. He relied on the history Claimant provided regarding his blunt traumas.²⁴⁴

²⁴² CX-6, pp. 9-10; CX-7, pp. 21-29, 51-52.

²⁴³ CX-7, pp. 25-29, 52-53.

²⁴⁴ CX-7, pp. 29-31.

Claimant admitted that he had some interpersonal difficulties with “Captain Shelton” and they frequently argued. Claimant’s current life stressor is primarily monetary. He wants to get back to work as soon as possible, but he needs to be retrained for another vocation.²⁴⁵

Dr. Wakeman has treated patients with anger management problems with behavior therapy and relaxation therapy. Self-controlled cognitive behavior therapy helps patients perceive situations that make them angry differently. Ochsner, had a two-week program, five days a week for about eight hours per day. The rate of success with head injury patients was not very high. About 50 percent of the head injury patients, in his subjective and clinical opinion, were significantly better following his intensive program. People with mild traumatic brain injuries do not necessarily have a higher success rate. Sometimes the patients with severe head injuries do better after finishing the program than a person who has clearly had only a mild head injury. Most often he prescribes antidepressants, SSRIs, mood stabilizing/augmenting drugs, and anticonvulsants. Very rarely, but in severe cases, he prescribes psychotropic medication to a psychotic patient. There was also a substantial portion of his patients who had compulsive/aggressive personality trait without suffering from a brain injury. They also required temper control management and treatment. People may be predisposed by personality to need treatment for temper control.²⁴⁶

Anti-seizure medication includes Dilantin and Tegretol. These medications sometimes have the capacity to control anger outbursts. He is not sure of the outcome from treating Claimant with anticonvulsants. He read about the disagreement regarding Tegretol between Dr. Greve and Dr. Ginzburg. Dr. Wakeman agrees with Dr. Greve. A few of his prior patients had side effects to the SSRIs. If a person takes a high dose of anticonvulsants, then it will affect them cognitively. However, most patients do not have significant side effects requiring them to stop the medication he prescribes. With a combination of therapy and medication, probably less than 50 percent of his head trauma patients were actually helped.²⁴⁷

Dr. Wakeman would not put Claimant back on a ship because unless his concentration and attention abilities significantly improve, it would be dangerous for him to work onboard a ship. He would not want Claimant in a situation where he may be around overhead equipment or where he could forget that there was a manhole in front of him. Dr. Wakeman opined that Claimant could benefit from some psychostimulants to help his concentration and memory, such as Adderall or Ritalin. He does not believe these were tried yet. Claimant should also continue his antidepressants because they also help a person focus better and deal with anger difficulty and impulsive control problems. Patients like Claimant generally improve over time, but he could not testify as to what percentage. With a person with a compulsive/impulsive personality, any stressor would exacerbate his negative personality characteristics. As a result, the stress of the litigation process will adversely affect someone like Claimant. Once the litigation is resolved, he

²⁴⁵ CX-7, pp. 13-14.

²⁴⁶ CX-7, pp. 31-33, 53-54.

²⁴⁷ CX-7, pp. 33-35, 54-55, 71.

will have one less stressor in his life. However, Dr. Wakeman did not believe that it would improve Claimant's overall mood and temper problems. He would still have mood and temper problems regardless of the outcome of his litigation. Dr. Wakeman stated that there are hundreds of studies that show patients with head injuries just do not get better. Richard Sternberg's "The Pain Patient" suggests that there is no miraculous recovery for people injured regardless of the outcome of their litigation.²⁴⁸

If Claimant had personality changes, temper problems, headaches, foggy memory, dizziness, forgetfulness, poor attention span, not registering things he sees, and poor energy before his September 2002 accident, then any number of future head injuries would make his symptoms worse. Whether Claimant could return to work after his injury is the only basis for determining the last incident aggravated those prior conditions. If the last incident aggravated Claimant's problems, Dr. Wakeman did not know whether Claimant's current condition was materially and substantially worse because of those pre-existing conditions. He had no neuropsychological data to compare to pre-2002 data. However, he believes Claimant's 2002 injury exacerbated Claimant's pre-existing conditions, if they existed beforehand. He could not testify as to what degree, but opined that "it would make a bad situation worse." Dr. Wakeman could determine if Claimant's neuropsychological testing results were secondary gain motivated, but not his anger because there is no testing for that. The only test that could be done was the MMPI, which was invalid. The MMPI helps provide a current mental status of a person's psychological functioning. With the MMPI, he can test if any part of an anger outburst is manipulative or do to secondary gain.²⁴⁹

The majority of mild head injury patients have impulsive control problems. With impulse control problems, any pre-existing personality characteristic that is negative is going to be expressed more than before the head injury. If anger or temper control was a problem for Claimant before, his head injury would exacerbate the outbursts that may have been expressed before to a lesser degree. A person usually develops their personality in their early years and any personality disorder is a result of a lifetime of development and not a result of a particular injury. A particular injury can be a stressor for people with such disorders. Head injuries do not cause personality disorders, but can create symptoms that are consistent with people who already have personality disorders. Head injuries and trauma to the brain make their disorders worse. If someone is already short-tempered and irritable, more stressors will make them more short-tempered and irritable. Impulsivity and irritability happen in a majority of mild head trauma patients. Unfortunately, the vast majority of these patients do not get better (less than 50 percent). Dr. Wakeman opined that it would be psychologically beneficial for Claimant to return to work if he could.²⁵⁰

²⁴⁸ CX-7, pp. 35-39.

²⁴⁹ CX-7, pp. 39-47, 55-56.

²⁵⁰ CX-7, pp. 47-48, 70-71.

Since neurology is Dr. Freiberg's area of expertise, Dr. Wakeman would agree with Dr. Freiberg if he said that the occluded or dissected vertebral artery had no long term health risks associated with it and that such a condition stabilizes and heals without further trouble. Dr. Wakeman did not review any records from Dr. Culver or Dr. Greve and had no reason to agree or disagree with their statement that Claimant's anger problems were heavily influenced by pre-existing personality factors and poor frustration tolerance because he does not know how they would know that. He does not think that any of Claimant's behavioral outbursts were ever unconscious or automatic. He thinks they were impulsive outbursts because of severe frustration of not obtaining some goal. If Claimant does not get what he wants, he becomes angry.²⁵¹

Dr. Wakeman did not know whether Claimant was treated for depression in connection with his head injuries. Depression can produce cognitive deficits in individuals that could be observed through the testing administered to Claimant. All of the tests he administered to Claimant were geared to measure frustration tolerance. Over the ten (10) hours of testing, Claimant became frustrated, however, there was no indication that he was going to yell or scream at Dr. Wakeman. Claimant showed "typical frustration." He did not have an inability to control his frustration or manage his temper. In his experience with testing other patients with traumatic or mild traumatic head injuries, they tend to have similar results to Claimant. It is not abnormal because "the frustration tolerance difficulty in a testing session is far removed from whether you're going to be able to feed your family or whether you're getting the proper medical care or proper diagnostic assessment."²⁵²

Dr. Wakeman has not spoken to anyone regarding Claimant other than Claimant's attorney. He encourages Claimant to look for employment, but also expressed that Claimant needs to be retrained in a job other than his usual employment. Claimant needs to be treated psychologically and with medication. He needs to be brought under control, then he needs vocational rehabilitation. Because he has not seen Claimant in over one year, it is difficult for him to know at what point of recovery Claimant is. However, based on when he saw Claimant one year before the June 2005 deposition, if Claimant went into treatment and was being treated with the proper psychiatric medications and anticonvulsant medications, being seen one to two times per week on an outpatient basis, and assessed vocationally, he would probably be able to work at this time. This all assumes that Claimant was treated appropriately.²⁵³

His opinion regarding employability is based on assumptions, including the success of Claimant's treatment. He cannot opine as to whether the treatment would have been successful since less than one-half of the people actually treated obtain benefits. Claimant's impulsivity and irritability adversely affect his ability to interact with other people in a normal workplace. Dr. Wakeman does not want Claimant going back to work in an industrial type of environment because of attention problems.

²⁵¹ CX-7, pp. 49-50, 53.

²⁵² CX-7, pp. 56-57, 66-68.

²⁵³ CX-7, pp. 59-62.

Claimant's problems associating and interacting with people on a normal basis would adversely effect any new employment. Claimant must first obtain treatment before attempting to return to the workplace.²⁵⁴

Claimant does not believe he is being cared for properly and it is "extraordinarily frustrating" to him. When Claimant threw the chair it was somewhat disproportionate to the obstacle before him, but not atypical of someone with an already existing aggressive personality, who has sustained a head injury that made his aggressive personality out of control. The head injury caused a lack of impulse control. Although Claimant has the capacity to stop himself, he is severely limited because of his impulse control problems. Claimant's ability to stop himself is impaired. The inability to stop himself is involuntary, but the action itself is voluntary.²⁵⁵

After Claimant's 2002 accident, it is possible but not probable that his condition would worsen without treatment. His depression could get worse which could exacerbate his head injury symptoms. Every person is a good candidate for treatment; however, it is difficult to predict the results. The majority do not succeed in getting better, but Claimant should be given the chance. There is nothing in particular that would lead Dr. Wakeman to conclude that Claimant would be in the majority group that does not get better.²⁵⁶

Dr. Leon A. Weisberg:²⁵⁷

He is the head of neurology at Tulane Medical School. He has been board certified by the American Board of Psychiatry and Neurology since January 1975. Claimant was referred to Dr. Weisberg by Dr. Ginzburg. He gets about one referral per year from Dr. Ginzburg and has also seen a patient for Claimant's attorney in the past. He has not seen more than one or two in ten years. Less than five percent of his patients are involved in litigation.

He saw Claimant on 03 Sep 04. Dr. Weisberg recalled that Claimant "was a very nice person. We had no difficulty relating to him. He caused no problems for the office staff and did not have any temper tantrums or rage reactions." Dr. Weisberg obtained a work history and a history of Claimant's series of head injuries. After his 1998 head injury, Claimant experienced headaches and blurred vision. All brain-imaging studies were negative and Claimant returned to work. In 1999, Claimant again lost consciousness after hitting his head on an air conditioning unit. He had a headache which lasted several weeks, but then returned to work without restrictions. In 2001, Claimant hurt his head after a crane and hook struck the left side of the top of his head. Merely getting knocked off one's feet is not relevant to whether there was a brain injury, but he was not wearing a hard hat and lost consciousness. "[W]hen he awakened, he was a different person." He became very angry and frustrated and would scream at people.

²⁵⁴ CX-7, pp. 62-64.

²⁵⁵ CX-7, pp. 68-69.

²⁵⁶ CX-7, p. 69, 72.

²⁵⁷ CX-8; CX-9; EX-11; EX-23.

Waking up in a blind rage is unusual because usually there is a loss of consciousness or attention. But that behavior is also indicative of someone having a loss of awareness. However, Claimant was able to return to work. One month later, around February 2001, he had another head injury. This time he was wearing a hardhat. He lost consciousness again. When he awoke he had neck pain. He was hospitalized at River Parishes Hospital and given a neck brace to wear for several weeks. They thought he was dehydrated and he felt better after getting IV fluids.²⁵⁸

The severity of a head injury is measured using verbal responsiveness, motor responsiveness, eye movement abnormalities, and the duration of loss of consciousness from the blow to the head. Claimant only described brief episodes of loss of consciousness. Therefore, Claimant's head injuries are in the mild range. Neurobehavioral changes from a head injury usually occurs where there has been a period of loss of consciousness or awareness of a few minutes up to 30 minutes and a period of amnesia or memory loss. Claimant only described brief episodes of loss of consciousness. If Claimant did not lose consciousness at all, then the injury would be classified as trivial from which neurobehavioral sequelae would not likely occur. Dr. Weisberg's reports stating that Claimant is a different person and more angry and frustrated after his 2001 accident are based simply on the history provided to him by Claimant. He based his opinion on the fact that Claimant had a 20 year work history of being an excellent, cooperative employee. His opinion would change if he had testimony from other people who knew Claimant that he had anger outbursts and temper management problems before his accidents. If co-workers testified that Claimant had anger problems before his head injuries, it suggests that Claimant's current problems are not related to particular incidents.²⁵⁹

It is significant that Claimant continued to work for one and one-half years after his February 2001 injury because it fits in with the natural history of a mild injury where 80 percent are back to work within one year. The fact that Claimant worked for so long following his February 2001 injury, suggests that he was not rendered disabled as a result of that injury. Assuming Claimant was struck in the head around September 2002 and was never able to return to work with any regularity following that incident, the September 2002 accident rendered him disabled.²⁶⁰

Claimant described the onset of "spells" where he feels weak and lightheaded. He becomes disoriented and cannot walk normally. Since his 2001 head injuries, Claimant describes personality and behavioral changes. He becomes angry very easily and has temper tantrums. He also gets frustrated easily and screams at people. Claimant first treated with Dr. Weisberg's colleague, Dr. Freiberg, but Claimant threw a chair at Dr. Freiberg. He does not know why the episode with Dr. Freiberg happened and Claimant could not explain it. Sometimes patients blame their doctors, but Claimant admitted that it was unprovoked. Claimant advised him his problems began after his 2001 injuries. Claimant feels drained after his "episodes" and has a loss of memory. He also has

²⁵⁸ CX-8, p. 1; CX-9, pp. 8-12, 46-47.

²⁵⁹ CX-9, pp. 28-34, 46.

²⁶⁰ CX-9, pp. 34-36.

problems sleeping. At the time of this evaluation, Claimant only took Dilantin and underwent anger management therapy. He saw multiple neurologists, psychiatrists, neuropsychologists, and cardiologists. Claimant is a high school graduate and has a degree in diesel mechanics. He has been arrested²⁶¹ and on one occasion got into an altercation with his wife's father, but was not arrested for that incident. He is divorced. He lived with his ex-wife for five (5) years and they were married for 18 months. Claimant denied ever getting fired from a job. He further stated that he has friends and gets along with people.²⁶²

Dr. Weisberg performed a neurological examination. Claimant's knowledge was consistent with his educational background. He interacted well with Dr. Weisberg and responded appropriately and when directed. Dr. Weisberg opined that Claimant was mentally capable of independent living and of handling his own finances. He saw no symptoms of anxiety, depression, or psychosis. In addition, there were no suicidal or homicidal ideations, hallucinations, or delusions. Claimant could lift 20-30 pounds without difficulty with his right and left arms. Claimant did not present with memory problems. One possibility of unprovoked rage is due to abnormal brain electrical activity, but there was no evidence of an abnormal electric disturbance during the four (4) hour study. He tried to provoke an episode, but could not.²⁶³

An MRI scan reported several high signal intensity lesions in the right occipital region and showed a right vertebral artery "occlusion."²⁶⁴ There can be multiple causes for high intensity lesions, including trauma. He did not have an opinion as to what caused this finding in Claimant. It would not be significant if Claimant was wrong about the side of his head that he hit. Regardless, Dr. Weisberg opined that Claimant's MRI and CT scans of his brain were normal. In addition, a follow-up MRI in April 2003 was normal, showing some improvement in Claimant's condition. The PET scan showed decreased metabolic activity in the temporal and parietal region. The temporal lobe houses memory and language, while the parietal lobe houses spatial orientation and sensation and the frontal lobe behavior and personality. Temper, personality, and behavior are due to the cerebral, cortical, and subcortical functions and cannot be localized. If it were localized, one would look at the frontal regions which cause an inhibition. The frontal lobe prevents a person from reacting. The PET scan cannot help determine how long a condition has been present or whether Claimant's anger management problems were related to the head blows.²⁶⁵

Dr. Weisberg assumed that Claimant suffered a vertebral dissection from the 2001 accidents. However, when he looks at the reports carefully, "there are no changes due to injury to the blood vessel." Although the report was interpreted as a traumatic dissection of the carotid, it could just be a congenital abnormality. Regardless an occluded vertebral

²⁶¹ Although Dr. Weisberg initially states that Claimant has been arrested, under his assessment of Claimant he reports that Claimant has an excellent work and social history, has never been arrested and has no history of drugs, alcohol, or tobacco abuse.

²⁶² CX-8, pp. 1-2, 4; CX-9, p. 10, 12.

²⁶³ CX-8, p. 3; CX-9, p. 19, 24.

²⁶⁴ The original report stated "elusion," however, in his 01 Nov 04 report, Dr. Weisberg corrected his mistake.

²⁶⁵ CX-9, pp. 13-18, 39-40.

affects a patient's ability to walk and coordinate, eye movements, speech, swallowing, sensation in the face, hearing, balance, vertigo and visual disturbances; but without neurological implications. Claimant complained of visual disturbances, but his visual activity was normal and no abnormalities were demonstrated. There is no way to say for sure that it was a traumatic situation. Claimant had no symptoms suggesting a brain stem or cerebella dysfunction. Dr. Weisberg could not determine whether the vertebral artery occlusion was due to a traumatic dissection or embolism secondary to alleged cardiac disease. Claimant had no neurological impairment referable to this occlusion. Regardless, Dr. Weisberg opined that the occlusion of the right vertebral artery has no medical significance. Since his head injuries, Claimant has developed episodes of anger and rage which always occurred with provocation. Claimant admitted to periods where he blacks out during his anger episodes.²⁶⁶

Claimant's behavioral disturbances only developed following the episodes in 2001. Before this, Claimant had an excellent work and social history. Dr. Weisberg found a temporal relationship between the trauma episodes in 2001 and Claimant's behavioral disturbances. Based on his review of the records and examination of Claimant, he could not opine as to how the mechanism developed. Claimant has not been able to return to work because of his episodes of rage and bad temper. Claimant informed Dr. Weisberg of a history of exposure to petro-chemicals, which can cause disturbances. However, it probably is not related to Claimant's anger management problems. Reference to Claimant's heart racing and supraventricular tachycardia is most likely not related to Claimant's head injuries. Claimant did not appear anxious or depressed at the time of his evaluation, although he was certainly frustrated by his inability to obtain answers to his questions (i.e. what caused his behavioral disturbances). Neuropsychological testing found Claimant had poor attention as a result of multiple concussions. Dr. Weisberg "would certainly concur with this assessment." Claimant was monitored for a four (4) hour study. The study was uneventful with no evidence of any episodes to suggest a partial complex seizure or abnormal electrical disturbances. He concluded that Claimant's behavioral disturbances could be occurring as a consequence of multiple head injuries.²⁶⁷

Dr. Weisberg re-evaluated Claimant on 01 Nov 04. Claimant had been working at a sugar mill since 01 Oct 04, with similar behavioral disturbances which interfere with his functioning. Claimant socially interacted with the examiner and followed simple commands. He was polite and his knowledge was consistent with his educational background. Claimant continued to be able to lift 20-30 pounds without difficulty. Claimant did not have any coordination disturbance that would be consistent with brain stem or cerebella dysfunction. He was treated unsuccessfully with anticonvulsant medication. As of 01 Nov 04, Claimant was stable. However, if the episodes continued

²⁶⁶ CX-8, pp. 3-4; CX-9, pp. 12-14.

²⁶⁷ CX-8, pp. 4-5; CX-9, pp. 14-15, 36-37.

then Claimant will have difficulty functioning in a vocational setting. Although Claimant is frustrated by these episodes, he does not show obvious signs of anxiety or depression. He believes his episodes are “based on an organic etiology which is a traumatic brain injury as the patient has had a prior excellent work record.”²⁶⁸

Claimant never mentioned an alleged September 2002 incident during his September or November 2004 examinations. It is not in Dr. Weisberg’s reports and he has no recollection of being told about it. Dr. Weisberg’s independent recollection is limited to the documentation in the record. He does not use a questionnaire. He takes the history directly and then dictates the report immediately upon seeing the patient. Claimant is a man with an excellent work history and was able to get along with people in a vocational and social setting until his accident. He then became episodic with unprovoked series of rage reactions which make him unable to function either socially or vocationally. He obtained this information from Claimant. There is nothing in his records to refute this information. When Dr. Weisberg talks about the accident, he is referring to 2001.²⁶⁹

He has tried to treat patients with anger management problems with no success. He used anti-epileptic drugs, such as Tegretol and Depakote. He treated no more than three (3) or four (4) over the past 30 years. He has no idea how long anger management problems persist in these types of patients. The treatment is usually unsuccessful and he refers them to a psychiatrist. He has never participated in any research or published any articles regarding anger management. He has reviewed some articles that link anger management problems to mild head trauma concussions, but it is not his field of expertise.²⁷⁰

Based on all of his testing and his review of the diagnostic films, Dr. Weisberg has no objective medical evidence to explain any of Claimant’s symptoms. He has to rely on the truthfulness and accuracy of Claimant’s premorbid condition, as well as for his current symptoms. He is not aware of any test that would allow him to determine whether Claimant’s anger management problems were voluntary or manipulative versus uncontrollable. From a neurological standpoint (in terms of cognitive, gait, coordination, strength, balance, vision) he would not place any work restrictions upon Claimant. However, the behavior problems would lead to Claimant getting fired.²⁷¹

Assuming Claimant hit his head again in September 2002, if his symptoms did not change from the other accidents, then he would believe that Claimant’s problems relate to the 2001 accidents, not the 2002 one. However, if it is determined that Claimant aggravated his pre-existing condition, then he believes that Claimant’s current condition is materially and substantially worse because of this pre-existing condition from his first four accidents. People with numerous concussions commonly have attention problems. The attention problems do not necessarily improve over time or resolve. The medical

²⁶⁸ CX-8, pp. 6-7.

²⁶⁹ CX-9, pp. 10-11, 20-21.

²⁷⁰ CX-9, pp. 21-22.

²⁷¹ CX-9, pp. 23-26.

literature²⁷² states that the majority of patients with mild traumatic brain injuries, about 80 percent, go back to work in one year. Dr. Weisberg could not give a medical reason why Claimant could be improved in March 2003 according to Dr. Freiberg, but then one year later his symptoms were worse.²⁷³

Other than the temporal relationship between the traumatic head injuries and Claimant's behavioral problems, based on Claimant's history and medical evidence there is nothing to suggest that a brain injury could explain his problems. He has difficulty explaining how a patient with a mild head injury developed this type of behavioral disturbances out of the blue, without any cognitive disturbance. To have a physical brain injury, he has to have some physical evidence of an injury, which Claimant does not have. Head traumas are only one of many possibilities to explain his problems. Claimant's underlying personality traits are another possibility, so is his pre-existing congenital problems. He associated Claimant's head injuries with his anger episodes because as far as he knew, Claimant had an excellent work history for 20 years. He would defer to psychologists and psychiatrists regarding the future of Claimant's care.²⁷⁴

Claimant was a cooperative man with an excellent work history that did not have any difficulties with rage or temper outbursts. If there was a representative change, then it certainly could be related to his head injuries. His opinion really depends on Claimant's actual history. A grumpy person is not the same as throwing chairs at people. Dr. Weisberg's opinion is based solely on his review of the record and examination of Claimant. If Claimant's ex-wife, friends, and family testified that there was a marked personality change from before and after these accidents, it supports Dr. Weisberg's original opinion that the rage disorder is causally related to the work accidents.

Dr. Weisberg has worked with Dr. Greve before and believes he is a good neuropsychologist. Dr. Greve's father, Dr. Kevin Greve, is in his department as part-time faculty. Dr. Weisberg's wife has taken a class with Dr. K. Greve and Dr. Weisberg has given lectures to his psychology classes at the University of New Orleans. He knows the doctor professionally and socially, but has no financial involvement with him.²⁷⁵

Ron Breedlove.²⁷⁶

He is a licensed clinical social worker with a Masters in social work. He is also board-certified in clinical social work. He has been in private practice since about 1991. Ninety percent of his practice consists of adults with mood disorders, substance abuse, and some marital therapy. Part of his practice includes treating people with anger management problems. He has treated a couple hundred patients with complaints of anger management problems. The source of their anger management varied. In 15 years of practicing, he discovered that people with problems with anger management have an

²⁷² Dr. Weisberg's testimony relied on an American Psychiatric Association book called "Traumatic Brain Injuries" from 2004. He could not recall the author's name.

²⁷³ CX-9, pp. 26-29.

²⁷⁴ CX-9, pp. 40-43.

²⁷⁵ CX-9, pp. 19-20.

²⁷⁶ CX-10, CX-11; EX-43.

impulse control disorder. Claimant is the first patient of Mr. Breedlove's in three or four years that was involved in litigation. In testing and interviewing these people, he found that about 70 percent had dopamine imbalance. The most common dopamine imbalance includes attention deficit disorder (ADD). People with ADD or ADHD have visible impulse control disorder. The onset of these problems, where it is visible in behavior, is puberty. About 70 percent of the people that come to him for anger management in fact have ADD. Medication is usually effective in controlling impulsive behavior, including anger.²⁷⁷

Of the remaining 30 percent of the people he treats for anger management, more than one-half of them are substance abusers. Chemical usage impairs judgment, reduces inhibitions, and makes people more impulsive and prone to outbursts. Sometimes anger is caused by environmental reasons, like learned behavior. Of the patients he has treated for anger management, he has never had a patient that related his anger problems to some type of head trauma. However, in Claimant's case, he relates the anger management problems to his head trauma. It is the only thing he can identify after reviewing Claimant's history and working with him. His opinion is based on the history Claimant gave him and a review of the medical records. He did not know if Claimant was impulsive or inappropriately displayed anger prior to his accidents, but Claimant denies such behavior.²⁷⁸

He is not a medical doctor and does not know what other contributing factors are. Claimant denied drug and alcohol abuse. Claimant was his first head trauma patient that had anger management problems. He is not familiar with medical literature regarding regular head trauma versus minor head traumas. The more stress patients with anger management problems are under, the worse their anger gets. Claimant sees everything in black and white. It is either all good or all bad. When he meets with Claimant, if Claimant has interacted with someone regarding his legal case, medications, or problems with pharmacists, within the past day or two, then that is what he talks about. A lot of Claimant's anger is directed towards these issues.²⁷⁹

He first saw Claimant in August 2005 and still treats Claimant. He saw Claimant on 8/11/05, 8/18/05, 8/25/05, 9/8/05, 9/22/05, 10/6/05, 10/13/05, 10/27/05, 11/22/05, 12/7/05, 1/4/06, 1/18/06, and 2/1/06. He has new patients complete an initial intake sheet. Claimant reported an inability to work for two years. He also informed Mr. Breedlove about his lawsuit against Employer. At one point, Claimant became frustrated and "a little loud while talking about his attorney." Claimant started out as an assistant engineer and then became an engineer. He was a merchant marine for 17 years. Claimant denied having a temper in those days and stated he enjoyed the challenge of his work. Now, Claimant watches television and plays online computer games. Claimant

²⁷⁷ CX-11, pp. 5-8, 12.

²⁷⁸ CX-11, pp. 9-11.

²⁷⁹ CX-11, pp. 11-14.

will misread a letter from his attorney and gets upset. His 17 year old stepson spends a lot of time with Claimant. Claimant will misread a letter and get upset over nothing. He also gets excited when creditors call about things insurance should have paid. He wanted to help Claimant not to get excited and put the focus more on himself.²⁸⁰

After Hurricane Katrina, Claimant did some volunteer work. His stepson is confined to a wheelchair and Claimant adapted his house for his stepson's disability. Although Claimant had not yet received his check, he was calm and fairly laid back. On 06 Oct 05, Claimant was upset because his prescriptions were not ready at Walgreens. Mr. Breedlove tried to talk to Claimant about his impulsive anger and how to control it. Claimant got frustrated and threw a chair into another chair and screamed. This let Mr. Breedlove actually see what Claimant's problem instead of just talking or reading about it. It happened instantaneously. There was no gear shift. Mr. Breedlove knew Claimant had a burst of adrenalin because he had to stand up and move around.²⁸¹

Claimant informed Mr. Breedlove that he goes to Immaculate Conception Church and does church activities with his stepson. Claimant denied fighting while growing up. Claimant told him that his sister died from alcohol and drug abuse in 2004 and that he had another sister in Little Rock. On 27 Oct 05, Claimant was still uneasy because his checks were falling behind. Claimant brought his stepson with him on 22 Nov 05. Claimant interacted well with his stepson. On 07 Dec 05, Claimant informed Mr. Breedlove that he "went off with attorney over the phone." Claimant has no insight into what sets him off.²⁸²

Claimant returned on 04 Jan 06, complaining that he had trouble getting his medications. It is all "black and white" to Claimant. He would not go back to a pharmacy because they did not have his prescription ready on time. Mr. Breedlove tried to get Claimant to go back and sort it out, but he refused and decided to have his prescription delivered to Northside. Claimant had a recent second hernia surgery, but was healing well. His first hernia surgery was a year ago. Claimant believes he is due \$4,000 in reimbursement for his first hernia surgery. He expressed resentment that his attorney does not call him back. On 16 Jan 06, Claimant looked tired and informed Mr. Breedlove that he was not sleeping well. Claimant wants to be assertive, but not angry. He thinks it makes him appear like he does not have any respect for people when he really does.²⁸³

On 1 Feb 06, Claimant was agitated and upset over a statement he received from an attorney. Claimant informed Mr. Breedlove that he had a confrontation with a driver at the sugar mill and was moved to another job in the warehouse. He saw several accidents and after six weeks, he could not work there any longer because of safety concerns. His goal with Claimant was to get him to focus on himself, have more insight, and to stop the impulsiveness. He made "incredibly little headway" with Claimant. He

²⁸⁰ CX-11, pp. 14-17.

²⁸¹ CX-11, pp. 17-19.

²⁸² CX-11, pp. 19-20.

²⁸³ CX-11, pp. 20-21.

believes he has seen some improvement with Claimant in his office, but not in the real world. Mr. Breedlove spoke with Claimant's father after Claimant "went off" on Mr. Breedlove. Claimant expressed guilt and feeling bad about the confrontation.²⁸⁴

Mr. Breedlove could not think of any work Claimant would be capable of doing. He tried to determine what Claimant could do, where his interaction with people and supervision would be minimal. He does not think continued treatment would improve Claimant's anger either. He does not know how Claimant behaved before his head injuries, but now Claimant is a religious guy and is pretty hard on himself. "But most of the time, he is a marshmallow." Mr. Breedlove believes that Claimant is intimidated by all the doctors and therapists he has seen. He has seen some changes since he first saw Claimant in August 2005 and his last appointment in February 2006. Claimant feels safe with Mr. Breedlove. He gets excited and talks loud, but does not go off.²⁸⁵

There is no way for him to determine whether Claimant's anger problems were self-serving or if there were secondary gain issues. Nonetheless, Mr. Breedlove did not feel that Claimant's problems were self-serving or due to secondary gain issues. His triggers are not very discriminatory. Claimant just goes off. Claimant never told Mr. Breedlove when his anger problems began. Claimant just said that he used to not behave that way. Claimant related about five or six specific accidents. At some point, Claimant became more compulsively combative and his boss wanted him to gain insight into his behavior. Claimant did not mention these problems happening to him before he was sent to anger management by his Employer. Claimant complained that his anger problems were getting worse over time. He blames his divorce on his anger problems. He believed his inability to control his anger caused his divorce. He tried marriage counseling, but it did not help. Claimant does not trust his own behavior.²⁸⁶

Mr. Breedlove has never seen other patients of Dr. Ginzburg. It was Mr. Breedlove's impression that he saw Claimant to help figure out what was going on with Claimant. Pat McClary referred Claimant to him to get some insight into Claimant's behavior and help his impulse control. He did not get anywhere with Claimant.²⁸⁷

Claimant controlled how often Mr. Breedlove saw him. Mr. Breedlove told Claimant he wanted to see him every couple of weeks, which is what happened. He believed he could help Claimant with a little more time and trust. However, if Claimant had been interacting with anyone about litigation, then that was all he wanted to talk about. He could not state whether more frequent visits would have obtained different results. It would help Claimant socially because he isolates himself sometimes, even

²⁸⁴ CX-11, pp. 21-23.

²⁸⁵ CX-11, pp. 23-24.

²⁸⁶ CX-11, pp. 24-27.

²⁸⁷ CX-11, pp. 27-29.

though he does have a support system. Right now, he does not offer Claimant anything more than being a sounding board for him to vent to. Initially, he tried to educate Claimant. People with impulse control disorders do not have any insight into their behavior because there is no mental component involved. It is just impulse and action.²⁸⁸

Claimant's problems appear to be more medically related and that is not Mr. Breedlove's area of expertise. He does not know how Claimant got the way he is. There is some distinction between medical etiology and trauma related causes. Stressors can trigger symptoms of impulsive behavior. Claimant is impatient, intolerant, easily frustrated, and does not understand a lot of things. The less he understands about a situation, the more frustrated Claimant gets. If some of these aggravating circumstances in his life were removed, he expects that Claimant's anger management or anger control problems might improve. Claimant is specifically frustrated by the civil system. Once he stops interacting with litigation, Mr. Breedlove believes Claimant's stressors would significantly reduce. He does not know if Claimant's unemployment contributes to his anger management, but believes it gives Claimant more time to contemplate things. Playing computer games gives him something to focus on intellectually and helps pass his time. Mr. Breedlove thinks Claimant is bored. People with Claimant's condition tend to find themselves less symptomatic when they are focused or involved in something that keeps their attention directed.²⁸⁹

Claimant is not adapting to his head injuries. Claimant is habitually frustrated. Mr. Breedlove believes Claimant's brain and thought process are damaged. He does not think Claimant is faking his condition.²⁹⁰

River Parishes Hospital:²⁹¹

On 06 Feb 01, Claimant presented to the emergency room at River Parishes Hospital after hitting his head with a chain from a crane while at work. He was driven to the hospital by another employee. He struck the left side of his head and lost consciousness for a few seconds. Claimant has no history of vomiting, vision changes, personality changes, or hearing loss. Claimant described dull headache and pain. He had a contusion on his scalp. He was prescribed ibuprofen and released.²⁹²

Claimant was admitted to River Parishes Hospital on 02 Mar 01 after hurting his neck. While working, a hatch cover fell on Claimant and jammed his neck. He was wearing a hard hat at the time and denied being hit in the head. He had difficulty standing after the incident. He complained of stiffness in his neck and shoulder line. He got knocked to the ground. He denied any loss of consciousness. He was given a cervical collar and diagnosed with acute cervical strain. No distress was noted. Claimant rated his pain 3 out of 10, which he described as discomfort. The radiologist report

²⁸⁸ CX-11, pp. 29-31.

²⁸⁹ CX-11, pp. 31-36.

²⁹⁰ CX-11, pp. 36-39.

²⁹¹ CX-12; EX-16.

²⁹² CX-12, pp. 22-28; EX-16, pp. 21-24.

referenced this as an “injury to head” and x-rays were taken of his skull, cervical spine, CT of the head, and a CT of the cervical spine. There were no identifiable cranial fractures or abnormalities. There was an absence of a normal cervical lordosis which suggests muscle spasm. The CT of the head revealed a high density halo seen along the left frontoparietal region, which appears to be related to artifact rather than subdural hematoma. There were no intracranial abnormalities observed. There was no evidence of cervical fracture or osseous abnormality. He was discharged that same day in stable condition. He was prescribed Darvocet for pain and was excused from work as of 02 Mar 01 until he was able to see a treating physician.²⁹³

Claimant was admitted to River Parishes Hospital on 20 Dec 01 after fainting at work while tightening pipes. All he recalled was everything getting dark. He denied any pain. There were no abnormal findings and the doctor’s impression was that Claimant had a “simple faint.” The emergency room doctor restricted Claimant to only light duty work with no overhead lifting until he could undergo further evaluation. Claimant was treated for chest pain and anxiety on 11 Apr 02. EPA and lateral chest x-rays were performed and revealed an abnormal study with described findings felt to be chronic in nature. Claimant returned on 02 Jul 02 suffering from heat exhaustion. Claimant began to sweat profusely and became weak while working in the heat.²⁹⁴

Claimant returned to River Parishes Hospital on 16 Sep 02 after his last accident. Claimant was admitted after hitting his head on a valve at work and was knocked unconscious. He did not know how long he was unconscious. Claimant did not actually recall hitting the valve and has just a little soreness to his right front head. He recalled ducking under a piece of equipment and next thing he knew, he was on the ground face first. Views of the skull showed no definite evidence of displaced or depressed skull fracture. An examination was also performed on his C-spine. There was no definite plain film evidence for cervical fracture and no prevertebral soft tissue swelling. The CT scan of the brain was also negative. The emergency room doctor did not think Claimant experienced any significant head trauma. He was more concerned with some of the findings on the MRIs and their long term ramifications. His differential diagnosis included mild blunt head trauma with a post concussive syndrome. Although the neurological exam did not have any specific focal findings, he did not want Claimant returning to work until Claimant saw a neurologist or a company physician for a recheck.²⁹⁵

Magellan Health Services:²⁹⁶

Claimant was sent to Magellan Health Services for anger management therapy by his supervisor, Mr. Cornwell. Mr. Cornwell’s concern as of 28 Jun 02 was Claimant’s anger outbursts over the past six (6) to eight (8) months. Claimant throws objects, kicks doors off frames. He had not yet been violent toward people and had good work

²⁹³ CX-12, pp. 29-39; EX-16, pp. 16-20.

²⁹⁴ CX-12, pp. 40-73; EX-16, pp. 6-15.

²⁹⁵ EX-16, pp. 2-5.

²⁹⁶ CX-40.

performance. Mr. Cornwell advised that the behavior started at about the same time he began taking his heart medication. Mr. Cornwell also completed a checklist that stated that Claimant: (1) often does not seem to listen; (2) has difficulty organizing work activities; (3) overreacts to situations; (4) is impatient and has low frustration tolerance; (5) benefits from a structured environment; (6) becomes disorganized if not following a schedule; (7) is physically aggressive, but not to people; (8) is oversensitive to rejection or criticism; (9) has sudden mood changes; (10) is hot tempered; (11) has frequent negative thinking or dissatisfaction; (12) tends to blame others; and (13) responds better to asking than being told. Claimant's job with Employer required that he handle multiple projects at the same time and he would become frustrated and short tempered.²⁹⁷

A clinical assessment was performed after Claimant had an argument with his boss and received a mandatory referral. Claimant received anger management therapy for eight (8) sessions over a period of two and one-half (2 ½) months. Claimant used to hold in his feelings, now he explodes. He has problems with co-worker relationships. He will throw tools, scream, and kick things, but has not gotten violent against people. Claimant was cooperative, but irritable. A drug and alcohol screening was completed and Claimant does not have problems with drug or alcohol abuse. He was diagnosed with anxiety and the goal was to help Claimant deal with anger and get him cognitive behavior therapy. They discussed the possibility of depression as a side affect to his heart medication. They also discussed control of his responses to situations, not control of situations. Claimant continued to blame Employer's organizational structure for his anger. On 13 Sep 02, Claimant was referred to a neurologist/neuropsychologist to rule out an organic cause for his behavior problems.²⁹⁸

Dr. Robert C. Dawson, III, and Culicchia Neurological Clinic.²⁹⁹

He initially treated Claimant upon referral from Dr. Freiberg on 11 Sep 02. Claimant's right vertebral artery was absent on his MRI which could happen due to dissection, spontaneous or traumatic, or from an embolus. An embolus would be of a cardiac origin. He referred Claimant to a cardiologist to determine whether Claimant had a hole in his heart. He could not opine as to why Claimant was missing the artery, but stated that if it was not due to an embolic source, then it was probably secondary to some type of trauma.³⁰⁰

Claimant returned on 02 Oct 02 with a new MRA. The vertebral artery is "totally occluded with regard to his brain and it is not likely to give him any problems." Claimant related that he hit his head again about one week before this evaluation, but Dr. Dawson could not quite understand why. Dr. Dawson did not think there was any continuing evidence of vascular disease. As such, there was no reason for Claimant to continue having cerebrovascular events.³⁰¹

²⁹⁷ CX-40, pp. 4-8.

²⁹⁸ CX-40, pp. 9-23.

²⁹⁹ CX-15.

³⁰⁰ CX-15, p. 2.

³⁰¹ CX-15, p. 1.

Dr. David W. Snyder and East Jefferson General Hospital.³⁰²

Claimant presented for a medical consultation on 07 Nov 02 complaining that he had a mini-stroke. Claimant relayed that about 1 ½ years ago he began having cardiac problems. While driving, his heart started racing and felt rapid and irregular. It became so intense that he soiled his clothes. He cleaned up when he got to work and tried to unload a truck. He became quite weak and drained. The tachycardia persisted for over 45 minutes and then gradually slowed down. Claimant stopped working and went home. One month later, while driving home from work, it happened again, this time lasting 20 minutes. Claimant stopped drinking caffeine and smoking. He was placed on Toprol XL. He worked strenuously while taking Toprol and while working with a hydraulic hose, Claimant lost consciousness. Nevertheless, the Toprol was continued. Around this time, Claimant began having problems with his temper and was referred for anger management. It was believed that he was suffering from depression as a side effect to the Toprol. Toprol was discontinued and Claimant was placed on Lanoxin and has not had any sustained tachycardia since.³⁰³

Claimant informed Dr. Snyder of his long history of multiple head injuries. Three of the head injuries were severe enough to cause loss of consciousness. After his most recent head injury in September 2002, Claimant has never really returned to normal. He has difficulty with mental acuity and misses things which used to be second nature to him. Dr. Snyder performed a physical examination and recommended that Claimant undergo coronary angiography.³⁰⁴

Touro Infirmary.³⁰⁵

An MRI of the brain was taken on 07 Aug 02. There was no evidence of acute intracranial process. There were no regions of abnormal signal intensity or diffusion weighted images to suggest the presence of an acute or early subacute infarction. There was nonspecific punctuate region of increased T2/FLAIR signal intensity posterior to the atrium of the right lateral ventricle in the deep white matter of the right occipital lobe, but that is a nonspecific finding. The MRI of the cervical spine was taken on 07 Aug 02. There was no evidence of abnormality and the cervical cord demonstrated normal signal intensity. The 07 Aug 02 EEG was also normal in both the alert and drowsy states, with no focal abnormality or epileptiform discharges.³⁰⁶

On 23 Aug 02, an MRA of the head was taken. The superior cervical, petrous, cavernous, and supraclinoid internal carotid arteries had normal appearances. The anterior and middle cerebral arteries were symmetric and also had normal appearances. There was nonvisualization of the right vertebral artery. The anterior circulation was

³⁰² CX-16.

³⁰³ CX-16, p. 1.

³⁰⁴ CX-16, pp. 2-4.

³⁰⁵ CX-13; EX-14.

³⁰⁶ CX-13, pp. 1-3; EX-14, pp. 18-22.

unremarkable. An MRA of his neck revealed a diminutive signal within the right vertebral artery at level V3 or V4. Findings may be secondary to vertebral artery stenosis, dissection, or possibly hypoplasia. The internal, external, and common carotid arteries were unremarkable.³⁰⁷

A follow-up MRA of the head was taken on 04 Apr 03. It revealed a normal intracranial MRA. There was tortuosity of the distal vertebral arteries. The hypoplasia or stenocclusive changes involving the right V4 segment remained stable since 23 Aug 02. An MRI of the brain was also taken. It was a normal non-enhanced MRI of the brain. An MRA of Claimant's neck with contrast was also taken on 04 Apr 03, revealing a normal cervical MRA.³⁰⁸

An MRA of the head without contrast was performed on 10 Nov 03. It was compared to the 03 Apr 03 study. The MRA of the head and neck was stable with the absence of signal in the distal right V4 segment consistent with either occlusion or slow flow. A repeat MRI of the brain was also performed and compared to the 03 Apr 03 study. There was one punctuate focus of hyperintensity on T2/Flair of unknown clinical significance and loss of the normal flow voiding again seen in the distal V4 segment of the right vertebral artery. Regardless, the MRI of the brain was unremarkable. Finally, an MRI of the orbit/face/neck was performed. The orbits had an unremarkable appearance and there was right maxillary sinus disease.³⁰⁹

Dr. Kevin W. Greve.³¹⁰

Claimant was referred to Dr. Greve as part of his workers' compensation case. He evaluated Claimant on 17, 18, and 19 Dec 02. Dr. Greve obtained a complete history from Claimant and reviewed his medical records. He also reviewed all of the procedures administered to Claimant. Claimant presented after a history of multiple work-related head injuries, possible stroke, and past work-related exposure to potentially toxic fumes. He complained of temper problems, increased fatigue, and inattentiveness. The purpose of the evaluation was to assess Claimant's level of cognitive and emotional functioning. Claimant also relayed temper and anger management problems, as well as problems "overlook[ing] and miss[ing] things that he is consciously looking for . . ." but it "does not feel like a memory problem." Claimant recently fainted at work and takes Toprol for tachycardia problems. Dr. Greve suggested that the Toprol may have caused the fainting and Claimant now takes Digoxin.³¹¹

Claimant was concerned that he got tired easily, like he has been up for a long time even when he sleeps okay. He also "feels ill and bloated." Naps help him feel refreshed. Cognitively, Claimant specifically reported no attention or speech problems, but admitted to having problems finding words. He also has a slight problem with

³⁰⁷ CX-13, pp. 5-6; EX-14, pp. 13-16.

³⁰⁸ CX-13, pp. 7-8; EX-14, pp. 5-12.

³⁰⁹ EX-14, pp. 3-5.

³¹⁰ EX-28.

³¹¹ EX-28, pp. 2-4, 6.

comprehension. Emotionally, he admitted to problems getting irritable at work and worrying. He denied any other problems. Claimant arrived at the evaluation alone. He was well motivated and cooperative, but seemed fatigued by the end of the second day of testing. His social interaction was appropriate.³¹²

Several validity tests were administered and there was no evidence that Claimant exaggerated or fabricated psychological, cognitive, or physical complaints or deficits. The neuropsychological evaluation results are considered an accurate reflection of his current cognitive and psychological status. While Claimant's simple motor fluency and sensory functions were intact, his fine motor control was in the borderline range bilaterally. Overall, Claimant's general intellectual ability was within expected limits and there was no evidence of a decline from expected premorbid levels. However, his reading score was below predicted levels. Claimant's level of alertness and attentiveness were intact within and across sessions. Claimant's overall performance related to attention suggested mildly slowed speed of processing. The data indicated that there is a 99.9 percent probability that Claimant has a clinically significant sustained attention problem. These results indicate that Claimant has problems "sustaining normal attentional focus for an extended period. He is distractible despite grossly intact focused attention span and resistance to interference. He may have some difficulty with mental manipulation."³¹³

Despite some spatial organization problems, Claimant's overall visual spatial and constructional skills were intact. His language and academic performance was also within normal limits. Claimant's memory test performances showed "normal learning ability under optimal circumstances. It is possible that his ability to remember new information in real world contexts might be adversely affected by his attentional difficulties." Claimant's executive functions indicated grossly intact higher level cognitive skills. Finally, Claimant's social-emotional functions were tested. There were no indications of acute psychological distress, however, there was evidence that Claimant made an attempt to present a socially acceptable front and was reluctant to admit personal shortcomings. Therefore, it is possible that he is experiencing some psychological distress that he did not acknowledge in the questionnaires. There was also evidence of a compulsive personality style which often makes him rather inflexible in his thinking and interactions. It may also make him manage his stress poorly and experience feelings of self doubt and inadequacy. Claimant's socially acceptable presentation may be a manifestation of this personality style.³¹⁴

Overall, the testing indicated that Claimant has grossly intact cognitive abilities with impaired attention. His pattern of deficits is consistent with the cumulative effects of multiple concussions. Claimant's personality style is also a factor, though it is a pre-existing factor that is not caused by any of his work-related injuries. There was no evidence of acute psychological disturbances such as a mood disorder or a specific anxiety disorder. Claimant's visual problems are most likely attention based. Dr. Greve

³¹² EX-28, pp. 5-7.

³¹³ EX-28, pp. 7-8.

³¹⁴ EX-28, pp. 8-12.

opined that Claimant's current functional difficulties probably reflect the effects of stress and anxiety on someone who does not handle stress well. Residual effects of multiple concussions may exacerbate the stress and worsen the attention problems. His cardiac and other ongoing medical problems are also additional stressors. Claimant's current cognitive and psychological status is not disabling, but does tend to reduce his cognitive efficiency and creates self doubt that may interfere with his ability to return to work. His conditions also make him more vulnerable to temper problems which have the potential to threaten his employability.³¹⁵

Claimant's temper problems are not uncommon in people with his personality type and are likely exacerbated by stress. Dr. Greve did not believe that the temper problems (which appear rather mild) were a direct consequence of his concussions. "However, his concussions and other medical problems reflect nonspecific stressors that lower his threshold for outbursts."³¹⁶

Dr. Lance Turkish:³¹⁷

On 22 Sep 03, Dr. Turkish completed a workers' compensation physician's report regarding Claimant's February 2001 (sic) injury. While at work, Claimant hit his head with a crane. Since then, Claimant complained that he was unable to see parts of objects or small objects when able to see other objects in the same area. Dr. Turkish diagnosed Claimant with a blunt head trauma and subjective visual disturbances. From an ophthalmologic standpoint only, Claimant could return to work on 09 Sep 03, with no permanent disability.

EyeMD Care Group:³¹⁸

Claimant was seen by Dr. Conway on 26 Sep 03 and 01 Oct 03. Claimant informed the doctor that he suffered several head injuries. Claimant was referred for an eye examination by Dr. Ginzburg for complaints that Claimant was not seeing objects that were very obvious. An Amsler grid exam was performed, but it did not show any defects. A Humphrey visual field 30-2 test was also performed. It showed that Claimant had excellent foveal sensitivity. He did have a mildly enlarged blind spot in his right eye and according to the statistical testing, he might have visual field defect based on that.³¹⁹

Dr. Conway could not account for his symptoms of missing things other than the somewhat enlarged blind spot in the right eye. However, that should be compensated for by the full field of the left eye. It would be reasonable for him to get examined by a glaucoma specialist. He also needed some neurosensory testing to check for other cranial or cognitive reasons for his very vague visual complaints.³²⁰

³¹⁵ EX-28, p. 12.

³¹⁶ EX-28, p. 13.

³¹⁷ CX-27; EX-21.

³¹⁸ EX-17.

³¹⁹ EX-17, pp. 2-4.

³²⁰ EX-17, p. 4.

P.E.T. Center of Louisiana:³²¹

On 08 Jun 04, a positron emission tomography of the brain was performed after a referral with multiple neurological problems. There was mild diminished metabolic activity in the temporal lobes bilaterally and the parietal cortexes as compared to the frontal and occipital cortexes. There was symmetric activity in the cerebellum. It indicated that Claimant suffered a closed head injury.

Jefferson Neurological Associates:³²²

Claimant's was sent to Dr. Adams for an evaluation on 18 Jan 05 by Employer. Claimant was accompanied by his father. His father provided some of the history, but Claimant gave a very detailed history. Several times throughout the interview, Claimant became somewhat agitated. However, he did not appear to have any significant difficulty regaining or maintaining self-control. Claimant described all of his head injuries and their related difficulties, including ones that are not the subject of this claim. None of the injuries necessitated medical care and Claimant was able to return to work without problem until his February 2001 injury. After that injury, Claimant began to develop anger problems. He believes he lost consciousness for a few minutes after he was hit in the head by a chain in February 2001. Claimant was taken to River Parishes Medical Center. He was sent back to work that same day. In March 2001, Claimant hit his head on an aluminum hatch. Claimant was wearing a hard hat, but recalled jamming his neck. He again treated at River Parishes Medical Center. Claimant was fitted for a neck brace, but he did not lose work because he went on a scheduled one week vacation.³²³

After his February 2001 accident Claimant developed problems controlling his anger. He flies into a rage and throws things. Claimant's father noted major personality changes after he hit his head with the crane-based hook. Claimant used to be calm and was usually the peacemaker, but now has great difficulty with anger management. After the 2001 accidents, Claimant also noted difficulty organizing and focusing. He used to be able to rebuild multiple items simultaneously, but now feels like he is inefficient because he must focus on one thing at a time. Claimant has also had instances of syncope/fainting since his head injury. The Toprol, prescribed to control his heart rate, may be the culprit. He was also exposed to various chemicals. Claimant was referred to Dr. Freiberg in July 2002 due to his temper problems. After an evaluation, Dr. Freiberg placed Claimant on light duty. Dr. Freiberg no longer treats Claimant due to an altercation where Claimant threw a chair through Dr. Freiberg's office window.³²⁴

Claimant hit his head on a valve in September 2002 and had a brief loss of consciousness. He treated with Dr. Dawson after this incident. Claimant did not return to work until May 2003, but was laid off due to company downsizing. He subsequently had difficulty maintaining employment. He worked at a sugar mill 1 ½ months, but

³²¹ CX-14.

³²² EX-24.

³²³ EX-24, pp. 2-3.

³²⁴ EX-24, pp. 3-4.

Claimant “was not very appropriate in the way he dealt with stressful situations and that job also ended.” His difficulties with anger management are not restricted to the workplace. He also had confrontations related to stressful family situations. Claimant has not received a clear diagnosis and has not been told that he has difficulties with seizures.³²⁵

Claimant did not play sports in high school and according to Claimant and his family, did not have prior difficulty with anger or any other psychological problems. A review of the medical records reflects that Claimant had no symptoms after his February 2001 injury and merely went to the hospital to get checked out. Claimant denied losing consciousness after hitting his head on the hatch cover, noting that he only jammed his neck. After his September 2002 head injury, the emergency room physician noted that he did not believe Claimant experienced any significant head trauma.³²⁶

There is extensive literature on the aftereffects of head injuries. Problems with attention are often found initially and are anticipated to improve and generally resolve. Dr. Adams opined that Dr. Freiberg documented this recovery as of 24 Mar 03. Once recovery occurs, decline is not expected on a physical basis unless there is further injury. As such, Dr. Adams believes there is simply no possible physical basis for a subsequent deterioration to the point Dr. Ginzburg labeled Claimant as totally disabled. Such a progression would not follow either the natural history of recovery from a brain injury or the documented pattern of recovery presented in Dr. Freiberg’s notes. It is also not consistent with the normal structure of the brain demonstrated by the final MRI scan. To make a diagnosis that there is a physical cause for Claimant’s disability, there must be some evidence of physical damage to the brain or a physical mechanism through which neurological damage would cause such a problem. There is nothing present to support such a finding. In addition, there is no physical basis for his reported visual problems.³²⁷

Dr. Rennie W. Culver:³²⁸

Employer referred Claimant to Dr. Culver for an independent psychiatric evaluation. A report was issued on 23 Apr 04. He reviewed the medical records provided and took them into account in his overall assessment. He also examined Claimant on 16 Feb 04. Claimant drove himself to the meeting. Claimant relayed having several head injuries, beginning in 1997. In February 2001, Claimant sustained his third head injury. He woke up in a “rage throwing stuff at the engine, kicking and cursing and they tried to calm [him] down.” He recalled being hit in the head, spun around, and then everything went white. It took co-workers 20 minutes to calm him down. He was advised by “Patrick” that he could not dial the phone right and was uncoordinated. In

³²⁵ EX-24, p. 4.

³²⁶ EX-24, pp. 4-7.

³²⁷ EX-24, pp. 7-8.

³²⁸ EX-25.

addition, his boss, Tom Cornwell, told him his right eye was droopy. Claimant was taken to the hospital for drug screening and a CAT scan, but both were negative. He was released after six (6) hours to return to work. He did not miss any other time from work due to the February 2001 accident.³²⁹

In March 2001, a hatch came down on his head. He was wearing a hard hat and did not lose consciousness, but his legs felt weak. He was sent back to the hospital for a CAT scan of his head. The CAT scan was negative and Claimant was prescribed a neck brace. He already intended to take a week off for vacation prior to this accident, so he did so and subsequently returned to work. He started getting short-tempered at work and was sent for anger management. MRI and MRA studies of his head revealed a blocked vertebral artery and three spots on his brain. Claimant described his temper as just getting mad and throwing things. He denied having these problems before the February 2001 injury. He admitted that he is fully conscious when these episodes occur. He remembers these episodes and feels “real frustrated” when they occur. He denied any other psychiatric or mental health problems.³³⁰

A mental status examination revealed that some of Claimant’s responses may indicate mild difficulty concentrating. He diagnosed Claimant with “possible cognitive disorder not otherwise specified . . . history of repeated cerebral concussion.” Dr. Culver admitted he was not provided all of Claimant’s medical records, including no records from Dr. Lutz or Dr. Martin. His opinions are based solely on the medical records he was provided with. From Dr. Culver’s review of the records, he does not agree that the occluded vertebral artery has been a significant element in Claimant’s symptomology. The vertebral artery is only one source of blood to the brain and its being occluded does not mean that the brain is inadequately perfused. However, Claimant’s history of multiple concussions is significant. Although all of the accidents would be classified as mild brain injuries, the accumulative effect of multiple concussions is well-recognized to be clinically significant. For example, boxers with multitudinous concussions tend to have some cognitive difficulties, but Claimant’s neuropsychological testing by Dr. Greve indicated grossly intact cognitive ability with impaired attention. In addition, Dr. Culver saw no cognitive deficit during his examination. However, on mental status examination Claimant’s performance indicated mild degree of difficulty concentrating. Claimant is “distractible despite grossly intact focused attention span, and resistance to interference.”³³¹

Dr. Culver related Claimant’s episodes of tachycardia to possibly severe anxiety. Moreover, feelings of disorientation, derealization, and depersonalization are typical in panic attacks as are feelings of weakness and being drained following the attack. In addition, Claimant was going through a stressful personal relationship. Therefore, Dr. Culver diagnosed Claimant as having a possible cognitive disorder not otherwise specified. He felt constrained to remark that he was not certain that any of the diagnostic entities satisfactorily encompass what Claimant actually has. He disagrees with Dr.

³²⁹ EX-25, pp. 4-6.

³³⁰ EX-25, pp. 6-10.

³³¹ EX-25, pp. 10-16.

Ginzburg's diagnosis that Claimant has a mood disorder due to a general medical condition. In addition, he is not satisfied with Dr. Greve's opinion that Claimant has post-concussion syndrome which is wholly applicable to Claimant's symptoms.³³²

What cannot be argued is that claimant has had several concussions and testing indicates that he has some difficulty with attentiveness. However, there was no evidence of depression or anxiety and he did not report headaches, confusion, or memory problems. Claimant could be described as having some obsessional personality traits, but certainly not to the degree of saying he has a personality disorder. Despite Claimant's numerous physicians and psychologists, "not a great deal has been found wrong with him." The most obvious finding is the occluded vertebral artery, but it does not appear to have much clinical significance and would not account for Claimant's behavioral changes. Dr. Culver does not believe Claimant has enough wrong with him to be considered psychiatrically disabled. From a psychiatric viewpoint, it is desirable that Claimant return to work and as his outburst are purely verbal, Dr. Culver did not believe that his behavior would impair his ability to work.³³³

On 05 Apr 05, Dr. Culver was asked to review and comment on updated medical reports from Dr. Weisberg and Dr. Wakeman. Dr. Culver did not agree with Dr. Greve's diagnosis of post-concussion syndrome because Claimant did not complain of memory disturbances or headaches, which are the two most common post-concussion symptoms. Broadly speaking, he believes many of Dr. Weisberg's and Dr. Wakeman's conclusions were consistent with his own. He believes that Claimant's history of multiple head injuries, although mild, could reasonably be regarded as having a cumulative effect. As such, they could account for at least some of Claimant's symptoms. However, that presupposes that Claimant had no such symptoms prior to having several closed head injuries.³³⁴

Dr. Culver re-examined Claimant on 06 Mar 06. Claimant continued to complain that he could not calm down or control his anger. He also complained of "black spots" and not seeing things that were right in front of him. According to Claimant, he has episodes of anger at least a couple of times per week or goes months without one. The last time he "blew up" was in his attorney's office. Claimant got angry and destroyed a chair. He denied remembering the topic of conversation prior to his outburst, but remembers the episodes after they occur. Claimant denied ever assaulting anyone during his episodes. He gets angry every time he has to rehash what is going on. During the mental status examination, Claimant's mood varied from normal to angry. This time, Claimant was diagnosed with intermittent explosive disorder and personality disorder,

³³² EX-25, pp. 16-18.

³³³ EX-25, pp. 18-19.

³³⁴ EX-25, pp. 2-3.

not otherwise specified. Dr. Culver agrees entirely with Dr. Barratt's opinion that Claimant's spells were not epilepsy. Neither Dr. Weisberg nor Dr. Freiberg diagnosed Claimant with epilepsy or commented that his spells had a neurological basis. In light of all of Claimant's neurological treatment, Dr. Culver did not believe that there is any neurological basis for Claimant's behavior.³³⁵

Dr. Culver does not believe that Claimant's succession of concussions is responsible for his purported change in personality and development of aggressive behavior. Therefore, he withdraws his previous opinion that Claimant may have a cognitive disorder. Claimant's behavioral problems are not due to repeated head injuries, but can be explained as a psychological phenomenon and assigned a psychiatric diagnosis. He changed Claimant's diagnosis to intermittent explosive disorder defined as "the occurrence of discreet episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property." The degree of aggression is grossly out of proportion to any stressors. Aggressive episodes may sometimes be followed by symptoms such as tingling, tremor, palpitations, chest tightness, head pressure or hearing an echo. Claimant has noted some paraesthesias. The DSM-IV-TR notes that the disorder may result in job loss, school suspension, divorce, difficulties with interpersonal relationships or other social impairments. Claimant's behavior has clearly caused occupational and interpersonal difficulty and even resulted in arrest on one occasion.³³⁶

Dr. Adams and other neurologists have "demonstrated very clearly" that the repeated head injuries could not account for Claimant's explosive behavior. In the absence of a convincing neurological basis for this patient's explosive behavior a psychiatric explanation must be offered. Claimant meets the standard accepted criteria for a diagnosis of intermittent explosive disorder. The diagnosis of personality disorder not otherwise specified is appropriate because Dr. Culver did not have enough data to make a more specific diagnosis. The overwhelming preponderance of the medical evidence is that he has no neurological disease either as a result of his occupational injuries or from any other cause. His problem is purely psychiatric and a result of some kind of personality disorder. While it has caused him significant interpersonal and social difficulty, he is not disabled.³³⁷

Dr. Benjamin Bushman.³³⁸

He first saw Claimant on 15 Jan 03 after Dr. Greve performed a neuropsychological evaluation. Dr. Bushman reviewed Claimant's history, stressors, and symptoms. Claimant returned on 31 Jan 03 in a tearful state. Claimant was very upset with Dr. Greve and Dr. Bushman because he received documentation that his benefits were cut off because Dr. Greve released him to return to work and even though Dr. Freiberg recommended work restrictions his company had no restricted duty positions available for him. He was left with no income and no way to return to work. He was

³³⁵ EX-25, pp. 19-29.

³³⁶ EX-25, pp. 23-30.

³³⁷ EX-25, pp. 30-31.

³³⁸ EX-27.

also upset because Dr. Ginzburg ignored Dr. Greve's recommendation to start him on Tegretol and instead started him on Paxil. He had been taking Paxil for about two weeks and has not noticed any effects other than loose stool and headaches the first couple of days. Claimant calmed down toward the end of their session.³³⁹

Dr. Bushman saw Claimant on 07 Feb 03 for a follow-up. Claimant's benefits were restarted and he got word that Employer wanted him to stay off work until his medical/psychological status was resolved. Claimant reported that the Paxil was helping "keep some of the edge off" of his anxiety and anger. They discussed conflict resolution strategies. Claimant returned on 17 Feb 03 "almost in tears." He was concerned about confidentiality of information leaving Dr. Bushman's office because a boat captain associated with Employer told him there was a rumor that Claimant was in the "Psycho Ward." Dr. Bushman reviewed the confidentiality waiver Claimant signed and assured him that neither he nor Dr. Greve sent information indicting treatment in a psycho ward. Since Claimant was not working, they agreed to taper off his visits and help him work on self-regulation strategies.³⁴⁰

On 03 Mar 03, Claimant returned for a follow-up. Claimant's concerns were not intended to imply that he did not want to return to work. He had a loss of appetite, which he attributed to the Paxil. They continued to discuss stress and anxiety management. Claimant returned on 23 May 03 after his repeat MRI and MRA. The results were satisfactory enough for Dr. Freiberg to release Claimant back to work without any restrictions. Claimant said Dr. Ginzburg released him with limited hours for the first two weeks. Claimant returned to work around 07 May 03, but was frustrated when Employer asked him to work more than 40 hour weeks. Dr. Bushman advised Claimant that he never placed a work restriction on him and anything he said was merely suggestions for Claimant to improve his stress management, sleep hygiene, nutrition, and exercise habits. In addition, neither he nor Dr. Greve ever said Claimant was disabled from working or that he had work limitations from a psychological standpoint.³⁴¹

Claimant returned in what appeared to be "good spirits." However, Claimant was laid off from his job along with 16 other people. He felt wronged because someone from his department with less experience and seniority than Claimant kept his job. He felt that the layoffs were an excuse for Employer to let him go. He expressed an interest in additional counseling, but Dr. Bushman advised him that everything has been addressed except for transitioning him back into the workforce. They both agreed that Claimant was functioning at a satisfactory level at work, until he was terminated, so additional treatment would be non-work related. Dr. Bushman offered to treat Claimant using his commercial insurance, but Claimant preferred to establish a therapeutic relationship closer to home.³⁴²

³³⁹ EX-27, pp. 2, 8.

³⁴⁰ EX-27, pp. 6-7.

³⁴¹ EX-27, pp. 4-5.

³⁴² EX-27, p. 3

Vocational Expert Opinion Evidence

Sharon Branan, LLC.³⁴³

She performed a vocational evaluation of Claimant on 21 Feb 05. To prepare for the evaluation, she reviewed Claimant's medical records and obtained a complete history from Claimant. The medical records revealed several work-related accidents: (1) 1997 – hit left side of head on scaffolding; (2) 1998 – hit the back of the head; (3) 1998 – hit the crown of his head on an air conditioning unit; (4) 2000 – hit the left frontal area by a chain and hook swinging from a crane; (5) 2001 – hit with a hatch causing cervical neck injury; (6) 2001 – hit in the head with a bit of a crane; and (7) 2002 – hit on top of the head with a sewer valve.³⁴⁴

She did not conduct a formal academic assessment because Claimant already underwent testing by numerous mental health professionals and no academic deficits were noted.³⁴⁵

Claimant has demonstrated a stable and successful employment history in an industry where frequent job changes are the norm. He furthered his value to the company by taking classes and obtaining certifications for advancement. “The fact that he has returned to work after so many injuries speaks to his loyalty and his solid work ethic.” Claimant used his personal vacation time to recover after he was struck by the hatch in 2000 to avoid having the company report a lost-time accident. Since he cannot return to work with Employer, Claimant sought alternate employment and began working at the sugar mill around October 2004. However, he resigned after becoming increasingly frustrated about unsafe work conditions and knew that further frustration would lead to an angry outburst.³⁴⁶

Claimant's various work related injuries have required both physical and psychological medical treatment. Physically, Claimant is limited to light duty with no lifting over 15 pounds. Claimant was on light duty when Employer terminated him. From a psychological standpoint, the record reflects a difference of opinion as to whether Claimant can return to work. Drs. Culver, Greve and Bushman do not believe Claimant is psychiatrically disabled, while Drs. Ginzburg, Wakeman, and Weisberg indicate the psychological issues pose significant obstacles to his employability.³⁴⁷

It is Ms. Branan's opinion that Claimant is unemployable. Even if she ignored the opinions of Drs. Ginzburg, Wakeman, and Weisberg and relied solely the other doctors' opinions, she “would respectfully refuse to assist [Claimant] in job placement services. Knowing his history of aggressive outbursts [she] would not assume the professional liability of placing him in an employment setting.” In addition, the psychological reports

³⁴³ CX-39.

³⁴⁴ CX-39, pp. 1-4.

³⁴⁵ CX-39, p. 4.

³⁴⁶ CX-39, pp. 4-5.

³⁴⁷ CX-39, p. 5.

include “attention and concentration impairment, mental inflexibility, higher order abstract reasoning inefficiency, behavioral disturbances, and alterations in behavior – specifically anger and impulse control. These factors make it difficult to determine exactly what transferable skills he realistically possesses.” Further, if he was released to return to work from a mental health standpoint, he is still limited to light duty work with a 15 pound lifting restriction. If gainful employment is considered in the future, she suggests “hiring a job coach to accompany him to the job site and assist him with coping skills and work place modification.”³⁴⁸

Larry S. Stokes.³⁴⁹

He interviewed Claimant on 14 Mar 05 for a vocational assessment to determine whether Claimant is capable of gainful employment and if so, in what capacity. Mr. Stokes reviewed Claimant’s medical records and obtained a complete history from Claimant. Claimant has no children of his own, but assists with the care of his handicapped stepson. He has a valid Louisiana driver’s license and is capable of driving automatic transmission vehicles. On occasion, he has difficulty with his vision while driving. Claimant is a high school graduate. He also received a vocational certificate in diesel mechanics and a Coast Guard license as an engineer. He reported having computer knowledge and experience. Claimant provided a complete work history as well. While in high school, he worked as a supermarket clerk and bagger. He also worked as a cashier and cook at fast food restaurants. He has worked as an assistant chief engineer, yard coordinator, port engineer, and shoreside mechanic since high school. He was a mechanic/engineer at the time of his injuries.³⁵⁰

Based on Claimant’s work history, he has gained skills which are transferable in the labor market including loading/unloading, attending assorted machines, using an assortment of tools and equipment, using shop math, and measuring and estimating material quantities. Claimant demonstrated above average aptitudes in general intelligence, verbal ability, numerical ability, spatial perception, and form perception. He demonstrated average aptitudes in clerical perception, motor coordination, finger dexterity, and manual dexterity. He demonstrated an ability to perform repetitive tasks, deal with people, direct people or events, make judgments, and meet set tolerances and precise limits.³⁵¹

Mr. Stokes did not have any records related to Claimant’s first injury on 06 Feb 01 or subsequent treatment. In addition, the medical records he had regarding Claimant’s 02 Mar 01 injury did not comment on Claimant’s physical limitations or employability. Mr. Stokes did not have any medical records after Claimant’s 16 Sep 02 injury that preclude Claimant from work from a physical or psychological/psychiatric standpoint. In addition, Drs. Greve, Freiberg, Bushman, Turkish, and Culver all commented that Claimant was not disabled from future employment. Assuming Claimant is released to

³⁴⁸ CX-39, pp. 5-6.

³⁴⁹ EX-22.

³⁵⁰ EX-22, pp. 1-3.

³⁵¹ EX-22, pp. 3-9.

return to work from a psychological/psychiatric and physical standpoint, Claimant would be capable of returning to his previous occupation as a mechanic/engineer and would not experience a loss in wage-earning capacity.³⁵²

Claimant would also be capable of returning to any of the occupations he has held in the past, including:

Occupation	Physical Strength Demand	Weekly Wage Ranges	Average Weekly Wage
Port Engineer	Sedentary	\$621.20 - \$994.40	\$790.40
Supermarket Clerk	Light	\$236.40 - \$297.60	\$274.40
Fast Food Worker	Light	\$235.60 - \$279.20	\$260.40
Yard Coordinator	Light	\$657.20 - \$1,352.00	\$990.00
Fast Food Cook	Medium	\$234.40 - \$272.40	\$256.40
Bagger	Medium	\$243.60 - \$332.00	\$296.00
Vehicle Washer	Medium	\$242.80 - \$346.40	\$305.20

He also identified alternate occupations which Claimant should be capable of performing based on his vocational profile, including surveillance system monitor, dispatcher, assembler, parking lot attendant, stock clerk, shipping clerk, order clerk, service station attendant, counter clerk, service writer, delivery driver, hand packager, and janitor. The weekly wages for these positions ranges from \$241.20 to \$836.80 per week with an average weekly wage ranging from \$283.20 to \$658.80 per week.³⁵³

Mr. Stokes performed labor market research by contacting local employers and researching employment opportunities in Claimant's geographic region. Available positions included: courier, technician, janitor (part-time), inserter/operator (part-time), car washer, delivery driver, and production worker. These positions had weekly wages ranging from \$241.20 to \$799.20 per week, with an average weekly wage ranging from \$283.20 to \$649.60. Based on the records received and reviewed, Mr. Stokes opined that Claimant's vocational prognosis is excellent.³⁵⁴

Mr. Stokes issued an updated vocational report on 03 Mar 06 after receipt of employment records from Alma Plantation. He performed additional labor market research within Claimant's geographic area and identified occupations Claimant may be capable of performing. Mr. Stokes noted that there were no physical restrictions outlined by Claimant's medical records. However, Mr. Stokes was aware that Claimant had exhibited anger outbursts and these behavioral issues were taken into account when identifying employment opportunities. The following outlines occupations Claimant is capable of performing alone or apart from others without ongoing contact with customers and/or employers:

³⁵² EX-22, p. 9.

³⁵³ EX-22, pp. 9-11.

³⁵⁴ EX-22, pp. 11-12.

Occupation	Physical Strength Demand	Hourly Wage Range	Average Hourly Wage
Insert Operator (part-time)	Sedentary to light	\$6.10 - \$8.74	\$7.79
Delivery driver (full-time)	Light	\$8.67 - \$13.72	\$11.63
Technician (full-time)	Light to medium	\$6.03 - \$7.27	\$7.08
Courier (part-time)	Medium	\$6.65 - \$9.88	\$8.58
Car washer (full-time)	Medium	\$6.07 - \$8.66	\$7.63
Delivery driver (part-time)	Medium	\$8.67 - \$13.72	\$11.63

Claimant is also capable of working as a shipping and receiving clerk, heavy equipment mechanic, automobile mechanic, order clerk, and hand packager. The part-time jobs had an average hourly wage of \$11.63 or \$232.60 per week. The full-time positions had an average hourly wage ranging from \$7.78 to \$16.73 per hour or \$311.20 to \$669.20 per week. Claimant has the potential to increase his earnings with time and experience.³⁵⁵

Mr. Stokes did not have records related to Claimant's 06 Feb 01 injury. Regardless, he opined that since Claimant continued to work after the accident and earned income, Claimant was not disabled. In addition, Claimant did not lose time from work after his 02 Mar 01 accident and merely took off for vacation for one week due to his symptoms. Therefore, Mr. Stokes opined that it is within reasonable rehabilitation probability that Claimant was not disabled after this accident. As to Claimant's 16 Sep 02 accident, Dr. Freiberg opined on 18 Sep 02 that Claimant should refrain from working until further evaluation. Claimant was released to return to work on 21 Apr 03 with no restrictions. Claimant returned to work in May 2003, therefore Claimant was only temporarily disabled for approximately three weeks. Based on the information Mr. Stokes reviewed, he opined that Claimant was not disabled after his accidents on 06 Feb 01 and 02 Mar 01 and was only temporarily disabled after his 16 Sep 02 accident.³⁵⁶

Any reason why Claimant is not currently working is related to behavioral issues rather than physical limitations. Mr. Stokes reiterated his opinion that Claimant's prognosis related to his ability to return to work from a physical standpoint is excellent.³⁵⁷

³⁵⁵ EX-22, pp. 12-16.

³⁵⁶ EX-22, p. 17.

³⁵⁷ EX-22, p. 17.

Other Documentary Evidence

Accident Reports:³⁵⁸

Claimant filed an accident report on 12 Mar 01³⁵⁹ after injuring himself on 06 Feb 01. Claimant struck his head on a chain sling from a crane. The accident was witnessed by Ronnie Rogers. Claimant was taken for medical treatment to River Parishes Hospital and returned to the vessel at 6:00 p.m. that day.

Claimant also filed an accident report related to his 02 Mar 01 injury that same day. On 02 Mar 01, Claimant jammed his neck after a hatch cover blew over and hit him in his head. There were no witnesses to this accident. Claimant left work to receive medical treatment at River Parishes Hospital. Claimant reported the accident the day it happened to Tom Cornwell, his supervisor.

Another accident report was filed on 19 Sep 02 after a 16 Sep 02 injury. Claimant stuck his head on an overhead pipe. He appeared dazed and weak in his legs. Charles Ruthedge was present and helped Claimant. Claimant was transported to River Parishes Hospital for treatment. Claimant notified Tom Cornwell immediately.

Port Allen High School:³⁶⁰

Claimant graduated in May 1984 with below average grades. He had one disciplinary action taken against him. He was suspended for two (2) days for using profane language at the Vocational Skill Center.

Port Side Vocational-Technical School:³⁶¹

Claimant entered the Vocational-Technical school on 27 Aug 84, but then dropped out on 08 Mar 85 for attendance violations and again on 19 Apr 85 "on leave." He returned on 13 Mar 85 and 29 Apr 85 respectively. He scored above average on the academic and occupational composite tests. A progress report reflected that Claimant performed "good" on all requisite tasks, including, but not limited to cooperating with others, attitude toward work and safety, behavior in class and shop, and dependability. He received a certificate of completion for the course of study prescribed for diesel equipment mechanics on 01 Jun 88. There were no disciplinary problems reflected in the record.

³⁵⁸ CX-19.

³⁵⁹ The report is dated 12 Mar 00, but references a date of injury of 06 Feb 01 and is date stamped 12 Mar 01.

³⁶⁰ CX-20.

³⁶¹ CX-21.

Employer's Personnel Records.³⁶²

Claimant was hired by Employer on 03 Sep 86. Before hiring Claimant, Employer conducted a background check. Employer contacted WBR Vocational and was advised that Claimant was a “good student all around” and received an A in the course for small engines. Employer also contacted National where Claimant worked as a retail clerk and was considered a “good employee.” Employer was informed by Port Side Vocational Technical School that Claimant was a very good and mature student with above average scores.³⁶³

On 04 Sep 86, a performance appraisal indicated that Claimant's communication skills were fully satisfactory and Claimant kept his supervisors informed and used tact and courtesy in dealing with people inside and outside of the company. A letter of commendation was written to the personnel department on 17 Jan 89, after Claimant was elevated to temporary chief. Claimant did a much better job than expected. Claimant was found to be polite and knowledgeable, use common sense, be safety conscious and obedient, and have “a quality that a lot of younger people don't have anymore.” Claimant was also respectful and “just a pretty nice guy.” Jerry Holland further reported that he had the “utmost trust” in Claimant and he deserved a “do good” letter. In March 1991, Claimant was presented with a recognition award based on his continued and valued service. In addition, Claimant's supervisors recommended him for an assistant engineer – limited and designated duty engineer – unlimited license in April 1992 and for a license upgrade in August 1994, based on his service, ability, and character.³⁶⁴

A performance appraisal from 29 Jul 96 reflected that Claimant's communication skills were acceptable. It noted that Claimant needed to develop a more diplomatic way to communicate with crewmembers and avoid confrontations. Claimant needed to learn how to communicate his problems and “not allow it to get personal.” Regardless, Claimant was promoted from chief engineer to assistant port engineer. On 03 May 00, a performance appraisal reflected Claimant's performance as “fully satisfactory,” including his ability to communicate. One of the goals listed reflected that Claimant needed to continue to improve his communications with vessel personnel.³⁶⁵

Claimant's employment was terminated by Employer on 28 May 03 because of steps to reduce its shore based staff.³⁶⁶

³⁶² CX-22.

³⁶³ CX-22, pp. 1-12.

³⁶⁴ CX-22, pp. 52, 55, 57, 59, 62-63, 105.

³⁶⁵ CX-22, pp. 109-115.

³⁶⁶ CX-22, pp. 137-158.

Initial Contact Survey for Personal Injury/Illness:³⁶⁷

Tom Cornwell, Claimant's supervisor completed an initial contact survey on 19 Sep 02. Claimant reported that he struck his head on an overhead pipe. Mr. Cornwell noted that Claimant appeared dazed and weak in his legs.

ANALYSIS

Section 33(g) and Third-Party Settlement

Carrier argues that Claimant is barred from recovery because he entered into a settlement related to the alleged injuries. Under Section 33(g)(2), Claimant forfeited his rights to compensation and medical benefits only if: (1) he was a person entitled to compensation under the Act for his accidents; (2) he entered into a settlement with a third person who is liable for damages on account of those accidents; (3) the settlement was for an amount less than what he is entitled to under the Act; and (4) he did not obtain written approval from his employer and the carrier prior to the settlement.

A Person Entitled to Compensation

The parties stipulated to the occurrence of injuries on 06 Feb 01 and 02 Mar 01. Employer admits that an injury occurred on 16 Sep 02, but Carrier denies that Claimant suffered an injury on that day. The preponderance of the evidence reveals that Claimant did in fact hit his head on 16 Sep 02 while in the course and scope of employment. There is no agreement on the extent and nature of disability resulting from each of the three alleged injuries. For the purposes of the analysis under Section 33(g), the Court assumes Claimant is a person entitled to compensation under the Act for injuries sustained in the three alleged accidents.

A Settlement with a Third Party Liable for Damages

A Settlement

On 4 Sep 03, Claimant filed a complaint in federal district court naming Capital Marine Supply, AEP Elmwood, Orsouth Transport, and Ingram Towing as defendants. He alleged Jones Act, general maritime law, and Section 905(b) causes of actions related to the three injuries which are the subject of his pending Longshore claim.

On 18 Apr 05, the district court granted summary judgment in favor of Capital Marine Supply, Orsouth Transport, and Ingram Towing and dismissed the complaint against them, finding that Claimant was not a seaman. That left Elmwood as the lone defendant and the 6 Feb 01 accident as the lone cause of action in the district court action.

³⁶⁷ CX-28.

On 16 May 05, Claimant entered into an agreement with Employer to release all of his claims relating to past Longshore disability and medical benefits. Employer agreed to pay Claimant \$86,044.12 in past compensation benefits and \$21,346.75 in past medical expenses. The parties agreed to proceed in the Longshore matter with a formal hearing, at which Employer could assert any and all defenses under the Act. The agreement further provided that Employer would provide medical benefits and pay Claimant continued benefits at a rate of \$842.50 per week, until a decision was issued in the Longshore case.

Pursuant to that agreement, on 23 May 05 Claimant signed a formal release that included all three injuries. The release and acknowledgement released Ingram Towing Corp.; Orsouth Transport; Capital Marine Supply Inc.; any parent, subsidiary or affiliated company; AEP Elmwood, individually and as successor to Elmwood Marine Services; any company, corporation, or entity that may have been working with or for, including their insurers, underwriters, servants, employees, officers, managers, agents, stockholders, directors, subsidiary, parent and affiliated corporations, successors, and assigns, and the crane barge EMS II, M/V Good Neighbor, M/V Mississippi Star, and any other vessel(s) which are or may be involved, their owners, charters, operators, masters, crews, insurers and underwriters.

On 3 Jun 03, Employer executed an LS-33 which approved the settlement of the cause of action against Elmwood arising out of the 6 Feb 01 injury.

Clearly, there was a settlement.

With A Third Party Liable for Damages

However, Claimant argues that there was no third party liable for damages. He suggests that since the Eastern District of Louisiana determined that Claimant was not a seaman and dismissed the complaint against Ingram, Orsouth, and Capital, they could not be a third party liable for damages. That would leave only Elmwood as a third party liable for damages from the 06 Feb 01 accident.

However, Claimant's position is inconsistent with the release he executed, which included not only Elmwood for the 6 Feb 01 accident, but also the M/V Mississippi Star for the 16 Sep 02 accident.

The M/V Mississippi Star was neither dismissed nor named in the district court action. Since a vessel, even if owned by the Employer, qualifies as a third party under the Act, the M/V Mississippi Star was a third party under the Act.

While a district court found that Claimant was not a seaman and dismissed Claimant's district court action against Employer, the M/V Mississippi Star was not a party to that action. Claimant might argue that collateral estoppel would apply and likewise result in a dismissal of the vessel. However, that expectation is not sufficient to absolve Claimant from his responsibility to obtain Carrier's approval before executing a release of the vessel.

Consequently, I find that there was a settlement which released at least two third parties potentially liable in damages: Elmwood for the 6 Feb 01 accident and the M/V Mississippi Star, for the 16 Sep 02 accident.

Without Obtaining Written Approval Prior to the Settlement

Claimant obtained written approval of the settlement as to all parties from Employer, whether by the LS-33 or in the actual settlement documents. Claimant did not obtain Carrier's approval as to any settlement. Carrier Signal was not Employer's carrier until 28 Jun 02 and was on the risk only for the 16 Sep 06 accident.³⁶⁸ Carrier did not sign any written settlement approval and did not take an active role in any settlement negotiations.

Consequently, I find that there was a settlement which released, without written approval from a Carrier on the risk, the M/V Mississippi Star, for the 16 Sep 02 accident.

An Amount Less Than His Entitlement under the Act

Claimant settled his case for \$86,044.12 in past compensation benefits and \$21,346.75 in past medical expenses under the Act, along with a promise to provide continued benefits of \$843.56³⁶⁹ per week until the date of a decision in his Longshore case. Since more than 64 weeks have passed since the date of settlement, Claimant has received almost \$54,000 in additional benefits, an amount that continued to increase until the date of this decision. In the aggregate, Claimant has essentially received the amount due to him under the Act as of the decision date. Thus, as of the date of this decision, Claimant would not have received under the terms of the settlement an amount less than his entitlement under the Act. Claimant cites that fact in arguing that he is not subject to the Section 33(g) bar.

However, the release of the M/V Mississippi Star extends to all non-Longshore liability, not just liability for damages or disability accruing through the date of the Longshore decision. Claimant's actual total Longshore entitlement would be the amount he had received as of the decision date, plus future disability and medical care. There is little question that if Claimant's disability is as significant as he alleges, he will be entitled to benefits beyond the date of this decision. If related to the 16 Sep 02 incident, those are benefits for which Carrier is liable.

Contrary to Claimant's suggestion, the settlement amount does not include any future payments by Employer subsequent to a decision in the Longshore case. The obligation to pay those benefits would not derive from the settlement; it would derive from the order. Thus, Claimant settled his case and released the M/V Mississippi Star from non-Longshore liability related to the 16 Sep 02 accident for an amount that by definition was less than his total potential Longshore entitlement.

³⁶⁸ CX-30; EX-4 (the certificate of cover shows that Signal only provided coverage for Orsouth Transport, LLC, Ingram Barge Co., and Capital Marine Supply, LLC from 28 Jun 02 through 30 Sep 05).

³⁶⁹ \$843.56 is his stipulated compensation rate.

Consequently, I find that there was a settlement which released, without written approval from a Carrier on the risk, the M/V Mississippi Star, for the 16 Sep 02 accident, for an amount less than his entitlement under the Act. Accordingly, Claimant is barred from recovery for benefits related to 16 Sep 02 accident.

Compensable Injury and Nature and Extent

Claimant has conceded that he substantially received, pursuant to his settlement, his full entitlement under the Act as it had accrued on the date of this decision. As a result, the primary issue involves his current and probable future condition and its origin. Therefore, the question is to what degree his present condition is a result through natural progression of (1) a pre-existing condition aggravated by either the 6 Feb 01 and 2 Mar 01 accidents or (2) the 6 Feb 01 and/or the 2 Mar 01 accidents alone or in combination. Given the finding under Section 33(g), the 16 Sep 02 accident is relevant only to the extent it may have acted as an intervening independent event to cause a disabling condition that prevents Claimant from returning to work.³⁷⁰

The parties do not dispute that Claimant suffered head injuries on 06 Feb 01 and 02 Mar 01. However, Carrier disputes that Claimant hit his head on 16 Sep 02. Employer does not dispute that an accident occurred on 16 Sep 02. To invoke the Section 20 presumption, Claimant must establish a *prima facie* case that he hit his head on 06 Feb 01 and/or 02 Mar 01 and that he suffered from a disabling condition as a result of said accidents. There is no presumption that a claimant suffered a physical injury.³⁷¹ The parties dispute whether Claimant suffered a disabling condition after any of the accidents.

While Claimant did not testify in this case and the Court was not able to evaluate his demeanor to determine his credibility, the Court finds that weight of the evidence and expert opinion in the case is that while there may be disagreement on their origin, Claimant was/is not feigning his anger problems and relevant personality traits. On the other hand there is conflicting evidence as to the onset and rate of acceleration of Claimant's outbursts and the contribution of either of the 06 Feb 01 and 02 Mar 01 accidents to his current condition. The medical experts are in stark disagreement. In many cases, their opinions are based on Claimant's subjective reports of his history of outbursts and personality changes and are only as accurate as those reports. In aspects relating to the immediate effects of the 06 Feb 01 and 02 Mar 01 accidents, Claimant's reports are inconsistent with and less reliable than those of other witnesses. This significantly impacts the weight to be given to medical opinions based on the accuracy of Claimant's history, particularly parts of Dr. Ginzburg's opinion. The recollections and testimony of Claimant's family were limited by their ability to personally observe him at various times. They were also aware of the issues in this case.

³⁷⁰ There maybe some ambiguity as to whether the analysis is one of causation or degree--whether the 6 Feb 01 and/or 2 Mar 01 accidents caused his current condition or as to what degree. A causation analysis would include the appropriate presumption and rebuttal analysis, but a degree assessment would not. In the cases of both the 6 Feb 01 and 2 Mar 01 accidents, I found the presumption was invoked, but rebutted. That leaves the burden on Claimant by a preponderance of the evidence, essentially collapsing the degree versus causation distinction.

³⁷¹ *Novak v. I.T.O. Corporation of Baltimore*, 12 BRBS 127, 129 (1979).

06 Feb 01

Neither Employer nor Carrier³⁷² denies that an accident occurred on 06 Feb 01 during which Claimant was struck in the head by a chain sling. However, both dispute that Claimant suffered a disabling condition as a result of the accident. The real issue is not whether there was a work related accident on 6 Feb 01, but the degree of harm that it caused.

Claimant went to the hospital immediately following his accident, received treatment, and had continued problems related to this incident. Claimant alleges that he lost consciousness as a result of this incident and then woke up kicking, screaming, and throwing things. He immediately went to River Parishes Hospital for treatment and claims that he has not been the same ever since. Dr. Boucvalt has treated Claimant since age 17 with no significant issues or problems.

Claimant's parents lived in the same area as he did until 1999 and never saw him have anger outbursts or get into fights. Although they were not sure of the exact date, they did not see changes in Claimant's behavior until around 2002. The changes started while he still worked for Employer, prior to the 16 Sep 02 accident. They never saw any behavior problems prior to Claimant getting hit in the head. Claimant's mother has never personally witnessed an outburst, but his father has been on the phone with Claimant when Claimant loses his temper and starts throwing and breaking things. Claimant's father testified that Claimant was always the person to calm others down and resolve problems. He does not know what has triggered the change in Claimant's behavior.

Claimant's wife also testified that Claimant was "calm, cool, and collected" during their marriage, never threw anything when he was angry, and never had fits of rage. Claimant never hit her and she never had to call the police on Claimant. Since 2001, Claimant is no longer the person she knew. Nothing ever used to upset him and now no one can talk to Claimant. He just starts screaming and becomes a "totally different person." She has witnessed Claimant have anxiety attacks with chest pain. He also has difficulty seeing things directly in front of him. Claimant's walls are now covered with holes from Claimant's punches. Claimant's stepson only knew about the 06 Feb 01 injury. He testified that Claimant used to be calm, but now screams, throws things, and gets real angry. He never witnessed such behavior before the accident.

Richard Peters has been Claimant's friend for over 25 years and did not notice any personality problems until around 2001-2002. He was not sure after which accident, just that Claimant was still working full-time. Since Claimant's head injury, Mr. Peters has personally seen him lose control in certain situations. Claimant is afraid of social gatherings and has closed himself off from the public to avoid outbursts. Mr. Peters lived with Claimant around 2001 and saw a lot of changes in Claimant during that time.

Claimant's supervisor, Mr. Cornwell, testified that Claimant received medical treatment following the accident, but lost no time. However, Claimant started kicking doors after the accident and Mr. Cornwell was afraid that Claimant would hurt himself and others. He has known Claimant since 1996. Prior to the 06 Feb 01 incident, Claimant "was very outgoing good

³⁷² Carrier was not Employer's insurer at the time of this accident.

boy” that people liked. He also testified that Claimant was cooperative and worked hard. Claimant did not have a reputation for being violent around work. Claimant’s co-worker, Mr. Watson, seldom worked with Claimant, but never saw Claimant display any rage or anger until 06 Feb 01. He witnessed the accident, but never completed an accident report and was never asked for a statement. According to Mr. Watson, Claimant did not lose consciousness and his outburst only lasted 2-3 minutes. Mr. Fontenot testified that Claimant jumped right up after hitting his head and had an outburst lasting 20 – 30 seconds. The only time he saw Claimant lose his temper was immediately after the incident. However, Mr. Rogers testified that the outburst lasted 30 – 40 minutes.

It is more likely than not, that Claimant did not lose consciousness as a result of the accident. His co-workers’ testified that he got up almost instantly after the incident. This absence of a loss of consciousness is significant in light of Dr. Weisberg’s testimony that the duration of loss of consciousness from a head blow helps characterize the severity of a head injury. Since Claimant did not lose consciousness, Claimant’s head injury on 06 Feb 01 was less likely to lead to neurobehavioral problems. Employer suggests that Claimant’s trip to the hospital was solely to get him checked out and points out that Claimant did not need treatment following this accident.

The record establishes that Claimant returned to work after the accident and suffered no loss of time from work. Although Mr. Cornwell testified that Claimant was very cooperative and people liked him, he also testified that he had complaints from boats that Claimant was having anxiety fits, yelling and throwing tools around 1997 or 1999. According to Mr. Cornwell, Claimant started becoming short tempered around the time he started losing weight and opened a bar. In a 03 May 00 report, Mr. Cornwell reported that Claimant needed to improve his communication skills. Mr. Cornwell never put any complaints by the boat captains into Claimant’s file, even though he admitted it was a “big deal.”

Although Claimant’s parents testified that Claimant has always been calm and well-behaved, they admitted they never saw Claimant at work and had no first hand knowledge to dispute co-worker testimony that Claimant had behavioral problems before his 06 Feb 01 injury. In addition, Claimant’s mother admitted she has never seen a rage attack before or since his accidents – she only heard about them. Claimant’s wife also admitted that she has never worked with Claimant and would not know how his behavior was on the job.

Although Claimant’s co-worker, Mr. Rogers, testified that Claimant was a hard worker and that they got along, he also testified that Claimant’s outbursts began before the 06 Feb 01 accident – that they started around 1999 or 2000. However, he did not feel like he had to walk on pins and needles. Claimant was short tempered, but not violent prior to the 06 Feb 01 accident.

Another of Claimant’s coworkers, Mr. Fontenot, also testified that Claimant became irritable and easily agitated after losing a lot of weight prior to 06 Feb 01. While there is testimony in the record implying drug use and observing that Claimant’s personality problems began after he lost a lot of weight; Claimant was drug tested immediately following the accidents and the tests were negative.

While the record reflects that Claimant had communication problems prior to his head injuries, it was not until after his 06 Feb 01 accident that his boss seriously considered that Claimant had an anger management problem that affected his ability to work. Mr. Cornwell did not order anger management therapy until after the 06 Feb 01 injury. Claimant also informed his anger management therapist that he “wasn’t right” since his 06 Feb 01 accident. His employment file has a performance appraisal indicating that Claimant’s communication skills were fully satisfactory and that his co-worker had the utmost trust in Claimant.

Although Mr. Cornwell described complaints from boat captains and co-workers, he never felt the need to put any complaints in Claimant’s employment file or send Claimant for anger management in 1999. Mr. Cornwell testified that Claimant never tried to kick doors in or get physically violent prior to February 2001. Claimant’s employment file had no complaints other than “improve communication skills.”

The Court finds that Claimant met the Section 20(a) presumption that a work related accident occurred which could have caused the harm/pain Claimant alleges, but that the evidence is sufficient to rebut any presumption that Claimant’s present or subsequent disability was a result of his 06 Feb 01 accident. Therefore the issue rests on the weight of the evidence. While Claimant’s behavior may have worsened over the period which included his 6 Feb 01 accident, concurrence does not automatically establish causation, and the medical evidence is in conflict.

In any event, any disability award must involve an economic loss coupled with a physical impairment. Claimant did not lose any time from work as a result of this injury and since he was capable of his usual employment, he was not disabled under the Act as to the 06 Feb 01 injury. The evidence does not establish that Claimant’s present problems are more likely than not a natural progression of his original injury on 06 Feb 01 that would have occurred independent of later intervening events.³⁷³ Mild head injuries, as suffered by Claimant, are not generally associated with long-term impairments.³⁷⁴ This is corroborated by Claimant’s immediate return to work and continued work with no problems until his subsequent head injury on 02 Mar 01.

Therefore, Claimant is not entitled to disability compensation as it relates solely to his 06 Feb 01 accident.

02 Mar 01

The analysis of the 2 Mar 01 accident is similar to that of the 6 Feb 01 accident with the additional possibility that the two accidents may have combined in leading to Claimant’s current condition.

³⁷³ Or that the present condition is substantially worse because of the 6 Feb 01 accident.

³⁷⁴ EX-29, Sureyya S. Kikmen, et al, *Neuropsychological Outcome at 1-Year Post Head Injury*, Neuropsychology, 1995 Vol. 9. No. 1.80-90 (1995) (however, the study cannot rule out occasional big effects in a small fraction of patients with mild head trauma).

As with the 06 Feb 01 accident, neither Employer nor Carrier denies that an accident occurred on 02 Mar 01 and that Claimant was struck when a hatch cover dropped on his head. They dispute whether Claimant actually suffered a disabling condition as a result of the accident. As a result, it is also clear that Claimant suffered a work-related accident on 02 Mar 01. It does not establish that Claimant actually suffered a harm or injury, as a result of that accident, that affects his earning capacity.

The record also establishes that Claimant raised the presumption as to the 02 Mar 01 accident as well as to a combination of the two accidents. Claimant was struck on the head by a hatch cover and injured his head and neck. Although Claimant was wearing a hard hat at the time of this incident, it was necessary for him to get treatment at River Parishes Hospital immediately after the accident. He also followed up with his personal physician, Dr. Boucvalt on 05 Mar 01. Dr. Boucvalt treated Claimant for a cervical strain. Dr. Boucvalt took Claimant off work for one week. Although Dr. Boucvalt has treated Claimant since age 17, he did not mention any personality problems until Claimant came to see him after his 02 Mar 01 injury. According to Dr. Ginzburg, Claimant did not start having problems “catching” things until after his 02 Mar 01 injury.

Claimant immediately reported this injury to Mr. Cornwell and Mr. Huntley. They treated it as a medical claim only and did not conduct an investigation into the accident. Mr. Cornwell sent Claimant to anger management therapy in June 2002 because of Claimant’s temper tantrums. Claimant was throwing things and kicking doors off of their hinges. Mechanics were getting too scared to work with Claimant.

Mr. Cornwell testified that he did not believe it was necessary for Claimant to attend anger management until June 2002, when the problems became “too severe.” Although he stated that he probably should have referred Claimant for anger management therapy prior to then, he felt he could talk Claimant down.

Claimant was first evaluated by Dr. Freiberg on July 2002. Claimant complained of being light-headed, disoriented, and had a foggy memory. Claimant’s affect was flattened and the anger management therapist believed Claimant was depressed. On 13 Aug 02, Claimant complained of forgetfulness, poor ability to control his temper, anger outbursts, and problems paying attention. Dr. Freiberg limited Claimant to no lifting greater than 15 pounds.

Although Dr. Ginzburg did not start treating Claimant until October 2002, he believed Claimant’s problems began prior to his 16 Sep 02 accident. Most people with head injuries see their problems resolve after one year. However, according to Dr. Ginzburg, people with multiple head injuries do not fit into that category and may have prolonged effects. Dr. Ginzburg further opined that people with multiple concussions, like Claimant, show impaired concentration and increased irritability. About 10 – 20 percent of the head trauma patients Dr. Ginzburg has treated

are not able to return to work where they had to work with or around other people. There is substantial evidence that traumatic head injuries are associated with numerous cognitive impairments, personality changes, irritability, aggression with little or no provocation, depression, anxiety, headaches, and fatigue easily.³⁷⁵

Employer rebuts this presumption by providing evidence that Claimant did not suffer a significant head injury on 02 Mar 01. Claimant's co-workers testified that Claimant did not lose consciousness as a result of this accident. In addition, Claimant treated at River Parishes Hospital and with Dr. Boucvalt for a cervical strain and specifically stated that he was wearing a hard hat at the time of injury and his injury was to his neck.

Employer having provided sufficient evidence to rebut the presumption, the Court turns to the weight of the evidence in the record. Claimant did not initially complain about head injuries, but in subsequent treatment reported that he felt his anger management and impulse control worsened after the 02 Mar 01 accident. In addition, Mr. Cornwell sent Claimant for anger management therapy in June 2002. Claimant needed additional medical treatment related to his head trauma. On the other hand, even though Dr. Ginzburg reported that Claimant's problems predated his 16 Sep 02 accident, he opined that the 16 Sep 02 accident was "the straw that broke the camel's back."

Nevertheless, Claimant did not lose any work as a result of this incident. At most, Claimant was limited for a short period of time to working light duty with a 15 pound restriction. Claimant never lost time from work and did not have a decrease in his earning capacity as a result of the 02 Mar 01 injury.

As with the 6 Feb 01 injury, any disability award must involve an economic loss coupled with a physical impairment. Claimant did not lose any time from work as a result of this injury and since he was capable of his usual employment, he was not disabled under the Act as to the 2 Mar 01 injury. The evidence does not establish that Claimant's present problems are more likely than not a natural progression of his injury on 2 Mar 01 that would have occurred independent of later intervening events.³⁷⁶ Mild head injuries, as suffered by Claimant, are not generally associated with long-term impairments.³⁷⁷ This is corroborated by Claimant's immediate return to work.

The same analysis applies in regards to a combination of the 6 Feb 01 and 2 Mar 01 accidents.

Therefore, Claimant is not entitled to compensation as a result of the 2 Mar 01 accident or a combination of the 2 Mar 01 and 6 Feb 01 accidents.

³⁷⁵ EX-29; EX-39, Ryan C.W. Hall, M.D., et al., *Definition, Diagnosis, and Forensic Implications of Postconcussional Syndrome*, *Psychosomatics* 46:3 (May-June 2005), available at <http://psy.psychiatryonline.org>.

³⁷⁶ Or that the present condition is substantially worse because of the 2 Mar 01 accident.

³⁷⁷ EX-29, Sureyya S. Kikmen, et al, *Neuropsychological Outcome at 1-Year Post Head Injury*, *Neuropsychology*, 1995 Vol. 9. No. 1.80-90 (1995) (however, the study cannot rule out occasional big effects in a small fraction of patients with mild head trauma).

16 Sep 02

While the evidence clearly raises the presumption that Claimant's current condition, in relation to his ability to work, may be the result of the any of the three alleged injuries or combinations thereof, the evidence also rebuts that presumption. None of the medical providers distinguish the resulting disabling condition between the three relevant dates of injury.

The February and March 2001 injuries did not disable Claimant by themselves because Claimant was able to return to work with no restrictions following those injuries. This is not a situation where the disability resulted in the natural progression of a prior injury because medical literature regarding head injuries and Claimant's medical records do not support such a finding. The medical literature reflects that in mild head trauma cases, the majority of mild traumatic brain injury patients are able to return to normal functioning usually within six months of injury. Regardless, Claimant had no economic loss until his 16 Sep 02 accident.³⁷⁸

In summary, the Court finds that Claimant raised the presumption that his current condition is a result of the 6 Feb 01, 2 Mar 01 or 16 Sep 02 accidents or a combination thereof. However, that presumption was also rebutted as to all three accidents. The Court finds that based on the weight of the evidence of the record as a whole, Claimant's current condition as it relates to his ability to work is not a direct result or natural progression of the 2001 accidents and is not substantially worsened because of those accidents

The finding under Section 33 renders moot any further analysis as to whether his current disabling condition is a consequence of his 16 Sep 02 accident.

Section 7 Entitlement to Medical Benefits

The medical benefit analysis is discrete from that of the benefit analysis. Although Claimant has no disability related to the first two accidents and is barred from recovery for the third because of his failure to get written approval by Carrier of the settlement releasing a third party, I find Claimant is nonetheless entitled under the Act to medical treatment related to his first two head traumas.

Although the first two traumas did not lead to disability in the absence of the third, they did require medical care. There was no significant change in the medical care recommended for Claimant between his first two and third head traumas. Claimant complained of problems catching things, inattentiveness, mental foggiess, anxiety, rage, anger, impulse control, low frustration tolerance and depression before the 16 Sep 02 injury. His anger management therapist referred Claimant to a neurologist and neuropsychologist on 13 Sep 02. Claimant's 16 Sep 02 injury did not break the causal connection between the necessary medical treatment related to the 06 Feb 01 and 02 Mar 01 injuries and his current condition.

³⁷⁸ EX-33, Dr. Kevin W. Greve, et al, *Compensation and Malingering in Traumatic Brain Injury: A Dose-Response Relationship*, The Clinical Neuropsychologist (2005).

The Court finds Claimant entitled to treatment with an anger management therapist, psychiatrist, psychotherapy, and neuropsychologist, as these treatments are reasonable, appropriate, and necessary as they relate to his injuries on 06 Feb 01 and 02 Mar 01.

Section 8(f) Special Fund Relief

Since Claimant is barred from recovering additional compensation related to his 16 Sep 02 injury due to Section 33, determination of entitlement to Section 8(f) relief is unnecessary.

ORDER AND DECISION

1. Claimant did not have an economic loss as a result of his 06 Feb 01 accident.
2. Claimant did not have an economic loss as a result of his 02 Mar 01 accident.
3. Section 33(g) bars Claimant from obtaining additional compensation related to the 16 Sep 02 accident.
4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's injuries on 06 Feb 01, 02 Mar 01, pursuant to the provisions of Section 7 of the Act.
5. Section 8(f) Special Fund Relief is not applicable as Claimant is barred from additional recovery based on Section 33(g).
6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.³⁷⁹
7. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

³⁷⁹ Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

8. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.³⁸⁰ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

³⁸⁰ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **16 Jun 04**, the date this matter was referred from the District Director.